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Supreme Court of the United States

WES BERTALAN, *et al.*,
Petitioners

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Ninth Circuit's new test proper for determining if a state action satisfies the "market participant" exemption to the preemptive effects of federal law? This question encompasses several subsidiary questions:

   1a. Did the Ninth Circuit err in concluding that the market participant exemption does not require that a state action be both for efficient procurement and narrow in scope, as this Court and the Second, Third, and Fifth Circuits have concluded?

   1b. Did the Ninth Circuit err in concluding that the market participant exemption does not require that a state action serve a pecuniary interest in efficiently procuring goods and services, but is satisfied by any procurement that serves the state's purposes, including environmental and other policy purposes?

   1c. Did the Ninth Circuit err in concluding that the market participant exemption does not require that the state action be an action in which an analogous private market participant could lawfully engage, as this Court concluded in *Boston Harbor*?

   1d. Did the Ninth Circuit err in concluding that the market participant exemption does not require that the state action be specifically tailored to a single project, as this Court concluded in *Brown* and *Boston Harbor*?

2. Does the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151, preempt a public purchaser of construction services from enforcing a union agreement that is illegal for a private purchaser to enforce under the NLRA?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the United States Court of Appeals for the Ninth Circuit were Plaintiffs-Appellants Wes Bertalan, Kevin Chavez, Joseph Nigbor, Travis Barrett, the Associated Builders and Contractors of San Diego, Inc. Electrical Unilateral Apprenticeship Committee, and the Southern California Chapter of the Associated Builders and Contractors, Inc. Electrical Unilateral Apprenticeship Committee, and the Defendants-Appellees Rancho Santiago Community College District and the Los Angeles and Orange Counties Building and Construction Trades Council.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporation and no publicly held company owns 10% or more of Petitioners' stock.

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Wes Bertalan, the Associated Builders and Contractors of San Diego, Inc. Electrical Unilateral Apprenticeship Committee, and the Southern California Chapter of the Associated Builders and Contractors, Inc. Electrical Unilateral Apprenticeship Committee respectfully submit this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 623 F.3d 1011 (8 Oct. 2010) (App. 1a). The opinion and judgment of the

United States District Court for the Central District of California, dated 23 October 2008 and 4 November 2008, are not reported, but are reproduced at Appendix 36a and 38a.

JURISDICTION

On 8 October 2010, the Ninth Circuit affirmed a district court judgment granting summary judgment to the Respondent-Appellees and against the Petitioner-Appellants. (App. 1a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Supremacy Clause to the United States Constitution, art. VI, cl. 2 and Sections 8(e) and (f) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(e) and (f), are reproduced at Appendix 53a.

STATEMENT OF THE CASE

Rancho Santiago Community College District is an agency of the State of California that operates several community colleges. The Los Angeles and Orange Counties Building and Construction Trades Council ("Union") is an amalgamation of unions in the construction trade.

In 2002, the District was authorized to issue $337 million in bonds to improve its physical facilities on multiple campuses by "Ballot Measure E." Without any analysis about its benefits or risks, the District entered into a Project Stabilization Agreement ("PSA") with the Union that governs all future construction projects funded by Ballot Measure E except small projects costing less than $200,000. This includes dozens of potential future projects undefined in nature, location and design. The PSA mandates that all private construction contractors on

these projects execute an agreement with a Union affiliate in which the contractor must: recognize the union as the exclusive representative of its employees; employ apprentices registered under the National Apprenticeship Act, 29 U.S.C. §§ 50 *et seq.*, only from union apprenticeship programs; hire employees through union hiring halls; abide by union work rules; pay into union health and retirement funds; and force their employees to pay union dues as a condition of employment.

Petitioners are an excluded nonunion apprentice and two nonunion apprenticeship programs that contend that the PSA violates the Supremacy Clause to the United States Constitution, art. VI, cl. 2, because it is preempted by the NLRA and the Employee Retirement Income Security Act ("ERISA), 29 U.S.C. § 1144(a). There is little question that PSA is preempted if it is a regulation.[1] The dispositive question is whether the PSA is a regulation, or an act of "market participation" exempt from the preemptive effects of federal law. *See generally, Chamber of Commerce v. Brown*, 554 U.S. 60, 69-71 (2008) (discussing market participant doctrine).

On 8 October 2010, the Ninth Circuit affirmed a district court judgment holding that the PSA is not preempted because it is an act of market participation. (App. 1a). The Ninth Circuit began its

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[1] Compelling private employers to enter into collective bargaining agreements with unions is certainly preempted by the NLRA because, among other reasons, § 8(d) of the Act reserves to employers the choice of whether or not to enter into such agreements. 29 U.S.C. § 158(d). The PSA's requirement that contractors use only union apprenticeship programs is preempted by ERISA because such apprenticeship programs are employee welfare benefit plans under 29 U.S.C. § 1002(1).

analysis by reciting the two-pronged *Cardinal Towing* test for market participation used by other circuit courts:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

(App. 18a) (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999). The Ninth Circuit then departed from other circuits and dramatically expanded the scope of the market participant exemption by holding that:

> (i) only one prong of the *Cardinal Towing* test must be satisfied to escape federal preemption, and not both prongs as required by other circuits (App. 18a);
>
> (ii) the "efficient procurement" interest required for market participation does not require a pecuniary interest in efficient procurement, but encompasses any "procurement that serves the state's purposes," including "environmental" and other policy purposes (App. 21a-22a);
>
> (iii) the "comparison to private parties" required for market participation does not require that the state action be one in which a private party would rationally engage or could lawfully engage (App. 24a-25a); and

(iv) the "narrow scope" required for market participation does not require that the state action be limited to a particular project, but is satisfied by rules applicable to all qualifying future actions (App. 27a-28a).

Under this expansive test for market participation, the Ninth Circuit held it irrelevant that the PSA was: not efficient or entered into by the District for pecuniary reasons (App. 21a); not an agreement that an analogous private party could lawfully enter into under the NLRA (App. 24a); and not narrowly tailored to a specific project (App. 27a). The Court concluded that the PSA is an act of market participation exempt from preemptive effects of the NLRA and ERISA.

REASONS FOR GRANTING THE WRIT

Question 1: Is the Ninth Circuit's new test proper for determining if a state action satisfies the "market participant" exemption to the preemptive effects of federal law?

This Court has held that a state acts as a market participant, rather than a regulator subject to federal preemption, when its action is designed to ensure efficient procurement of goods and is narrowly tailored to a specific project. *See, e.g., Brown*, 554 U.S. at 69-70. Other circuits have followed this precedent. The Ninth Circuit, however, has veered from this precedent and erroneously expanded the scope of the exemption far beyond its rationale. The Court should take this case to provide the lower courts and states with guidance as to the proper application of the market participant doctrine to ensure that this exemption does not swallow the

general rule of federal preemption delineated in the Supremacy Clause to the United States Constitution.

I. The Ninth Circuit Dramatically Expanded the Breadth of the Market Participant Exemption by Adopting a Test That Conflicts With Decisions of This Court and Other Circuit Courts of Appeal

A. The Ninth Circuit's Conclusion That a State Action Need Not Be for Efficient Procurement *and* Narrow in Scope Conflicts with the Decisions of This Court and the Second, Third and Fifth Circuits.

The Ninth Circuit's conclusion that market participation requires only that a state action be for "efficient procurement" *or* "narrow in scope"—i.e., that it satisfy only one prong of the *Cardinal Towing* test (App. 18a-19a)—brings the court into conflict with the decisions of the Second, Third and Fifth Circuits, *see Cardinal Towing*, 180 F.3d at 692-93 (requiring satisfaction of both tests); *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 215-16 (3d Cir. 2004) (same); *Healthcare Ass'n v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (same), and with the precedents of this Court.

> In finding that that the state agency had acted as a market participant [in *Boston Harbor*], we stressed that the challenged action "was specifically tailored to one particular job," *and* "aimed to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost."

Brown, 554 U.S. at 70 (quoting, in part, *Boston Harbor*, 507 U.S. at 232) (emphasis added).

This conflict of authority must be resolved because, under the Ninth Circuit's test, state actions will be exempt from federal law if merely (1) for efficient procurement, even if not narrowly tailored, or (2) narrowly tailored, even if unrelated to efficient procurement. Both ramifications will undermine the general rule that state actions that conflict with federal law are preempted and unconstitutional.

Foremost, the Ninth Circuit's jettisoning of the narrow-scope required for market participation whenever a state pursues a procurement interest greatly expands the scope of the exemption by suddenly making laws and rules of general application acts of market participation. This is incompatible with the doctrine's purpose of distinguishing a market *action* from a state *regulation*, i.e., a rule of general application. A regulation does not cease being a regulation merely if for efficient procurement. But under the Ninth Circuit's test, a state law controlling all future state spending decisions can be an act of market participation, and thus exempt from federal law, if for efficient procurement.

Second, the Ninth Circuit's holding that the market participant exemption "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services," is contrary to the very basis for the market participant doctrine: that the state is acting like a private proprietor in the market, and not as a regulator. (App. 19a). The mere fact that a regulation is narrow in scope does not mean that it is not a regulation. Yet, under the Ninth Circuit's test, states can freely enact rules contrary to federal laws, such as the NLRA and ERISA, simply by targeting a narrow class of citizens or entities. For example, a

state could decide to award certain public construction work solely to unionized contractors for the purpose of increasing union membership, and without regard to pecuniary need or detriment, without fear of federal preemption. Indeed, that is what occurred here.[2] The Ninth Circuit's attempt to take the "market" out of the market participant doctrine undermines the doctrine, ignores the precedent set by this Court, and must be reversed.

B. The Ninth Circuit's Conclusion That the Market Participant Exemption Does Not Require That a State Action Serve a Pecuniary Interest in Efficiently Procuring Goods and Services, But Is Satisfied By Any Procurement That Serves the State's Purposes, Including Environmental and Other Policy Purposes, Conflicts with This Court's Precedents.

It is well established that the market participant exemption requires that a state action be for the "efficient procurement of goods and services." *Brown*, 554 U.S. at 70. The Ninth Circuit is construing this requirement into irrelevance by holding that it does not require a pecuniary interest in efficiently procuring goods or services, but rather encompasses any "procurement that serves the state's purposes." (App. 21a) (quotation omitted). This includes "environmental" and other non-economic purposes (App. 22a).

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[2] Petitioners presented undisputed evidence that District officials entered into the PSA as a political payback to the Union, did not undertake any analysis to determine if the PSA would be beneficial economically, and were informed that the PSA could increase costs.

Construing "efficient procurement" to require neither an "efficiency" nor "procurement" interest not only does great violence to English language, it undermines the very point of the market participant doctrine. A pecuniary interest is a key distinction between the state acting as a purchaser as opposed to regulator of private conduct.

The Ninth Circuit's conclusion conflicts with the precedents of this Court and lower courts that require a pecuniary objective, as opposed to a societal objective, for market participation[3]. It also directly conflicts with this Court's holdings in *Gould*, *Golden State*, and *Brown* that states do not become market participants simply by pursuing their policy goals through their spending powers. *See Gould*, 475 U.S. at 289[4]; *Golden State Transit Corp. v. City of Los*

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[3] *See, e.g., Brown*, 554 U.S. at 70 (holding that state did not act as a market participant because its "legislative purpose is not the efficient procurement of goods and services, but the furtherance of a labor policy"); *Boston Harbor*, 507 U.S. at 229 (contrasting purchaser acting pursuant to "profit motive" with regulator acting on "the basis of labor policy"); *id.* at 232 (finding market participation when state action is "aimed to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost"); *Wisconsin Dep't of Indus. v. Gould*, 475 U.S. 282, 291 (1986) (stating that a "response to state procurement constraints or to local economic needs" is a market participant interest); *Cardinal Towing*, 180 F.3d at 692 ("courts have found preemption when government entities seek to advance general societal goals rather than narrow proprietary interests through the use of their contracting power," and citing cases).

[4] The Ninth Circuit unpersuasively attempts to limit *Gould* to the proposition that the market participant doctrine does not protect state procurement actions that affect private conduct unrelated to the performance of contractual obligations to the state (App. 22a). While this is undoubtedly a limit on the

Angeles, 475 U.S. 608, 614 (1986); *Brown*, 554 U.S. at 69-70; *see also Sage*, 390 F.3d at 219. The Ninth Circuit's holding that market participation includes any "procurement that serves the state's purposes" (App. 21a), be it an environmental, labor, or other policy purpose, is at odds with decades of precedent and the rationale underlying the market participant doctrine.

C. The Ninth Circuit's Conclusion That Market Participation Includes State Actions in Which An Analogous Private Market Participant Could Not Lawfully Engage is Erroneous and In Conflict With *Boston Harbor*

Again construing words into utter meaninglessness, the Ninth Circuit acknowledges that market participation requires a "comparison with the typical market behavior of private parties in similar circumstances" (App. 18a), but then holds it irrelevant that "that no private party would have entered into a project labor agreement providing so few benefits and that no private party in the District's position could have lawfully entered into such an agreement." (*Id.* at 24a). In so doing, the Ninth Circuit brings itself into conflict with this Court's holding in *Boston Harbor* that state law is not preempted "where analogous private conduct would be permitted," and that only "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a [union] prehire agreement, a public entity *as purchaser* should

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doctrine, states are also preempted from from pursuing regulatory objectives even through narrowly-tailored procurement actions.

be permitted to do the same." 507 U.S. at 231 (emphasis in original). Indeed, the notion that market participation includes conduct that market participants would not and could not lawfully engage in unmoors the doctrine from it logical foundation.

The Ninth Circuit attempts to distinguish *Boston Harbor* by averring that this Court focused on whether the state action was consistent with congressional intent under the NLRA, and not with the formal terms of the statute. (App. 25a). That simply does not make sense. How can conduct be consistent with a statute's purpose if it is inconsistent with the statute's terms? Congressional intent is stated in the NLRA's language. As demonstrated below, the District's PSA policy violates both the letter and spirit of the NLRA. *See* pp. 16-20, *infra*.

D. The Ninth Circuit Erred in Concluding That the Market Participant Exemption Does Not Require That the State Action Be Specifically Tailored to a Single Project, as This Court Concluded in *Brown* and *Boston Harbor*.

In *Brown*, this Court reiterated that "[i]n finding that the State agency had acted as a market participant" in *Boston Harbor*, "we stressed that the challenged action 'was specifically tailored to one particular job.'" *Brown*, 554 U.S. at 70 (quoting, in part, *Boston Harbor*, 507 U.S. at 232). The Ninth Circuit gutted this narrow tailoring requirement by holding it satisfied by the PSA, an across-the-board policy applicable to all qualifying projects pursued by the District. (App. 27a). In so doing, the Ninth Circuit not only brings itself into conflict with *Boston Harbor* and *Brown*, but muddles an important line distinguishing true acts of market participation

from government regulations subject to federal preemption.

The sine qua non of a regulation is that it is a "rule," or "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." *Black's Law Dictionary*, 1446 (9th Ed. 2009). By contrast, non-regulatory actions are not "rules" controlling future conduct, but rather are decisions specific to a particular issue. It is the difference, for example, between a procurement regulation (i.e., the state shall only buy stationery from union shops) and a procurement decision (i.e., the state decides to buy stationery from a particular union shop in a specific instance).

The Ninth Circuit completely missed this fundamental distinction by focusing on an irrelevant comparison of the total size of the District's projects to the project at issue in *Boston Harbor* (App. 27a).[5] The relevant distinction is not the total amount of dollars involved, but that the PSA is not a decision based upon a specific situation–a decision "specifically tailored to one particular job" as in *Boston Harbor*, 507 U.S. at 232. The PSA is a rule governing dozens of potential projects that the District might construct in the future. Rules of general application are regulations subject to federal preemption.

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[5] If total dollar amount were the dispositive factor, this Court would not have concluded that the statute in *Brown*, which applied to private employers receiving more than $10,000 in program funds, was not specifically tailored to one particular project. *Brown*, 554. U.S. 70.

E. The Court Must Resolve This Conflict in Authority Because There Is Uncertainty in the Lower Courts about the Proper Scope of the Market Participant Exemption.

There is considerable uncertainly in the lower courts regarding the proper scope of the market participant exemption, as illustrated by inconsistent results reached by courts in similar cases[6]. The Ninth Circuit is compounding this uncertainty by announcing an incredibly broad standard for market participation inconsistent with this Court's precedents and those of other circuits[7]. In the Ninth

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[6] *Compare Sage*, 390 F.3d at 217-18 (locality acted as a market participant exempt from NLRA preemption when imposing union labor peace agreement) with *MMAC v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005) (opposite conclusion); *Building & Const. Trades Dept., AFL-CIO v. Allbaugh*, 295 F.3d 28 (D.C. Cir. 2002) (executive order prohibiting mandatory project labor agreements on federally funded projects act of market participant) with *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Comm'rs*, 98 Ohio St. 3d 214, 781 N.E.2d 951 (2002) (state law prohibiting mandatory project labor agreements on state funded projects not act of market participant and preempted by NLRA).

[7] The uncertainty and need for guidance is illustrated by the procedural history of this case. The district court initially denied the defendants' summary judgment motion because the defendants had only satisfied one of the two prongs of the *Cardinal Towing* test. While the case was pending, the Ninth Circuit in *Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006), *reversed on other grounds by Brown*, 554 U.S. 60, concluded that that a state acts as a market participant if it can satisfy one of the two prongs. The district court then granted the summary judgment motion, concluding that the District acted as a market participant because the PSA satisfied one prong of the test.

Circuit and elsewhere, this will encourage states and localities to push the envelope with respect to using their procurement powers to implement labor and other policies at odds with federal law.

In order for state agencies that oversee hundreds of billions of dollars in annual public expenditures to chart their conduct, it is imperative that this Court establish a consistent and rigid test delineating when states and localities act as a market participants. The lower courts need guidance as to whether and how to apply the *Cardinal Towing* test, what constitutes efficient procurement of goods and services, the relevance of analogous private conduct, and when a state action is narrowly tailored to a specific project. Without this guidance, courts will apply inconsistent rules to state action in the context of the construction industry and beyond.

II. This Question Is Exceptionally Important Because the Market Participant Exemption Will Swallow the Rule under the Ninth Circuit's Expansive Test

As established above, the Ninth Circuit dramatically expanded the breadth of the market participant doctrine by first holding that it applies if a state action is either for "efficient procurement" or "narrow in scope," and then defining either requirement so broadly as to render it meaningless. Just about any regulatory interest pursued by a state solely through a procurement process will be exempt from the preemptive effect of federal law under the Ninth Circuit's expansive test.

This will undermine the fundamental purpose of preemption under the Supremacy Clause: that federal law not be supplanted by patchworks of

inconsistent state and local laws. The national system of labor relations established under the NLRA will be most strongly affected, as there is long and recent history of states and localities attempting to impose their own concept of labor policy on private employers and employees under the guise of market participation[8]. The Ninth Circuit's ruling will open the floodgates to even more aggressive meddling. The end result will be the balkanization of labor policy that Congress sought to avoid when federalizing labor law under the NLRA. *See NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

The deleterious effects of the Ninth Circuit's market participation test are not limited to the NLRA, but threaten all other federal statutes that states and localities want to supplant. For example, a district court in the Ninth Circuit recently held that an environmental rule imposed by the Port of Los Angeles on all trucks doing business at the port is an act of market participation exempt from federal preemption. *See American Trucking Ass'n v. City of Los Angeles*, __ F. Supp. 2d __, 2010 WL 3386436, at pp. 27-29 (C.D. Cal. 2010). If an environmental rule applicable to over 16,000 trucks that operate at the busiest port in the nation is not a regulation, the word has clearly lost all meaning in the Ninth

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[8] *See, e.g., Brown*, 554 U.S. 60 (state prohibiting employers from using state funds to deter union organizing); *Pataki*, 471 F.3d 87 (similar); *Gould*, 475 U.S. at 28 (state denying funds to employers who violate allegedly violate NLRA); *Golden State*, 475 U.S. at 614 (city refusing to do business with employer in labor dispute with union); *Alameda Newspapers, Inc. v. City of Oakland*, 95 F.3d 1406, 1415-16 (9th Cir. 1996) (same); *Sage*, 390 F.3d at 217-18 (city conditioning funding on labor peace agreement with union); *MMAC*, 431 F.3d 277 (same).

Circuit. The Court must take this case to clarify and properly limit the scope of the market participant exemption to federal preemption.

Question 2: Does the NLRA preempt a public purchaser of construction services from enforcing union agreements illegal for private purchasers to enforce under the NLRA?

This case also presents an important issue left unresolved in *Boston Harbor*: can purchasers of construction services enter into union agreements that require that they only do business with union contractors? In *Boston Harbor*, this Court held it lawful for a public purchaser to respect a union pre-hire agreement entered into by a private contractor engaged primarily in the construction industry because such agreements are lawful under §§ 8(e) and (f) of the NLRA, 29 U.S.C. §§ 158(e) and (f); *see* 507 U.S. at 230-31. But, as the Ninth Circuit itself recognized, this case presents a different issue: can purchasers of construction services themselves enter into such union agreements?[9] As explained below, the answer is "no" because Congress chose to not allow unions to exert top-down organizing pressure through any entity other than true construction contractors under §§ 8(e) or (f) of the NLRA. This is a question of great importance, as unions are circumventing Congress' strict limits on secondary economic pressure by aggressively seeking subcontracting and

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[9] *See* App. 25a-26a ("The agreement in *Boston Harbor*, unlike the PSA here, fell squarely within NLRA provisions exempting construction industry employers from the prohibition of pre-hire agreements because the state agency's project management company, rather than the agency itself, entered into the agreement with the union.").

pre-hire agreements with public purchasers of construction services.

I. Sections 8(e) and (f) of the NLRA Permit Only Construction Contractors to Enter Into Subcontracting and Pre-Hire Agreement with Unions, and Not Purchasers of Construction Services Analogous to the District.

Section 8(e)'s construction industry proviso permits only an "employer in the construction industry" that has a collective bargaining relationship with a union to enter into so-called "subcontracting clauses" that make execution of union contracts a condition of performing construction work for that employer. 29 U.S.C. § 158(e); *see Connell Constr. Co. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616, 632-33 (1975); *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 653 (1982). It is an unfair labor practice under § 8(e) for any other employer to enter into an agreement with a union to "cease doing business with any other person." 29 U.S.C. § 158(e).

Section 8(f) of the NLRA permits only employers "engaged primarily in the building and construction industry" to enter into so-called "pre-hire" collective bargaining agreements with construction unions, which are agreements entered in the absence of any showing of majority employee support for the union. 29 U.S.C. § 158(f). It is unlawful for any other employer to enter into a pre-hire agreement with a union.[10]

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[10] Specifically, but for the safe harbor of § 8(f), it is an unfair labor practice for employers to enter into collective bargaining agreements with unions that are not the exclusive representative of their employees under § 9(a) of the NLRA, 29 U.S.C.

Taken together, §§ 8(e) and (f) announce a clear congressional policy to limit the use subcontracting and pre-hire agreements to true construction contractors. Any other employer, including a purchaser of construction services, cannot lawfully establish a pre-hire relationship with a construction union under § 8(f) and, as such, cannot establish the bargaining relationship needed to satisfy 8(e)'s construction industry proviso.

If the District were a private entity, it would violate the NLRA by entering into the PSA. The District is not "engaged primarily in the building and construction industry" and thus could not enter into a pre-hire agreement with the PSA's terms under § 8(f).[11] The District's subcontracting agreement in the PSA to only do business with Union signatories would violate § 8(e), as the "District concedes that the PSA was not reached in the context of a collective bargaining relationship." Dist. Ct. Op. (App. 47a); *see Connell*, 421 U.S. at 632-33; *Woelke*, 456 U.S. at 653. Accordingly, since analogous private conduct would not be permitted, the District is not acting as a market participant under *Boston Harbor*, 507 U.S. at 231.

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§ 158(a), or to require employee membership in such unions under § 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3). *See, e.g.*, *Ladies Garment Workers v. NLRB*, 366 U.S. 731, 736-38 (1961).

[11] The PSA contains each of the four clauses that only construction contractors may enter into under § 8(f) in the absence of majority employee support for the union. This includes clauses: (1) recognizing the Union as the employees' exclusive representative; (2) mandating employee membership in the Union within seven days; (3) requiring referral from the Union as a condition of employment; and (4) establishing training and experience qualifications for employment.

The Ninth Circuit erroneously states that the "identity of the parties who signed the project labor agreement in *Boston Harbor* only formally distinguishes that agreement from the PSA here," (App. 26a), as if the actual requirements of §§ 8(e) and (f) of the NLRA are irrelevant formalities. To the contrary, Congress purposefully limited the availability of subcontracting and pre-hire agreements to construction contractors "to limit 'top-down' organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees." *Connell*, 421 U.S. at 632. In particular, Congress did not intend to allow unions to apply economic pressures on contractors and their employees through "strangers," i.e., employers that lack a representational relationship with the union.

Connell is instructive, as the District and Union's scheme is almost identical to that found unlawful in the case. There, Connell Construction entered into a subcontracting clause functionally identical to that in the PSA. 421 U.S. at 620. Like the District, Connell was a stranger employer, in that its employees were not represented by the union. *Id.* at 620, 627. Also like the District, Connell's only obligation to the union was to force contractors with which it did business to execute a union contract.

This Court found the scheme so repugnant to congressional intent that it held § 8(e)'s construction industry proviso inapplicable even though Connell was indisputably an "employer in the construction industry" under § 8(e)'s proviso. *Id.* at 631-32. "[I]f we agreed . . . that the construction industry proviso authorizes subcontracting agreements with 'stranger' contractors . . . our ruling would give construction unions an almost unlimited organizational weapon."

Id. at 631. The "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously." *Id.* at 633. Thus, the Court held that § 8(e)'s proviso only permits subcontracting agreements between employers and unions that exclusively represent their employees. *Id.*; *see also Woelke & Romero*, 456 U.S. at 653 and n.8.

The Union here is doing exactly what *Connell* holds repugnant to congressional intent under the NLRA: applying top-down organizing pressure on contractors and their employees through a stranger (the District). The only difference is that the Union is using a public instead of a private entity. Unlike in *Boston Harbor*, the parties here are acting contrary to "the legislative goals that animated the passage of the §§ 8(e) and (f)." 507 U.S. at 230. As such, the District and Unions' conduct is not that of market participants and is preempted by the NLRA.

II. This Question is of Exceptional Importance Because the NLRA's Prohibitions on Top-Down Organizing Are Being Circumvented By Union Subcontracting Agreements With Public Entities

This Court's concerns in *Connell* are being increasingly realized as unions aggressively seek and obtain subcontracting and pre-hire agreements from public entities that finance construction projects.[12] By targeting the entity at the apex of any construction project—its financier—unions can impose them-

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[12] *See, e.g.*, Dr. Herbert R. Northrup & Linada E. Alario, *Government-Mandated Project Labor Agreements in Construction, The Institutional Facts and Issues and Key Litigation*, 19 Gov. Union Review 3, 22-25 (2000).

selves on all contractors and their employees on its projects in one stroke. By targeting public entities, unions circumvent the NLRA prohibitions that bar such schemes with analogous private entities.

It is imperative that the Court ensure that unions not accomplish through public purchasers of construction services what Congress barred them from accomplishing through private purchasers under §§ 8(e) and (f) of the NLRA. A contrary result will undermine Congress' intent to restrict top-down economic pressure. Unions will acquire the "unlimited organizational weapon" feared in *Connell*, and become free to enlist any public entity over which they have political influence to exert pressure on private contractors and their employees to unionize. 421 U.S. at 631-32.

In addition to disrupting Congress' carefully-crafted scheme of labor relations in the construction industry, union subcontracting agreements with public entities inflict considerable harm on taxpayers, employees, and contractors. It is well-documented that these arrangements significantly increase public construction costs by excluding contractors and employees who wish to work nonunion.[13] This covers the vast majority of the workforce, as

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[13] *See* Vincent E. McGeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 Seton Hall Legis. J. 423, 449-50 (1995) ("It is axiomatic that reducing the pool of eligible bidders will increase costs," and "[s]tudies show that union labor increases costs over open shop contractors by twenty to sixty percent"); *see also* Northrup & Alario, *supra* note 12, at 35-37; *Maurice Baskin, Union-Only Project Labor Agreements: A Public Record of Poor Performance* (2005) (*available at* http://www.abc.org/files/Government_Affairs/PLAStudies/PublicRecordofPoorPerformance2005.pdf).

approximately 85% of all construction workers are nonunion.[14] Those nonunion employees willing to temporarily work under union agreements are forced to pay union dues and have portions of their compensation diverted to union fringe benefit plans from which they will receive no benefits, thus resulting in an estimated 20% reduction in their take home pay.[15] Nevertheless, use of union subcontracting agreements in the public sector continues to grow as the result of powerful union political influence, as is the case with the District here.[16]

Whether unions can obtain and enforce subcontracting and pre-hire agreements with public financiers of construction work, which would be illegal under the NLRA in private sector, is a matter of great importance both legally and practically. The issue is not going to be conclusively resolved without this Court's intervention. The petition for certiorari should be granted.

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[14] Bureau of Labor Statistics Annual Economic News Release on Union Membership, Table 3 (14.4% of construction workers represented by union in 2007) (*available at* http://www.bls.gov/news.release/union2.t03.htm).

[15] *See* Dr. John R. McGowan, *The Discriminatory Impact of Union Fringe Benefit Requirements on Nonunion Workers Under Government-Mandated Project Labor Agreements* (2010) (analyzing prevailing wage work) (available at http://www.abc.org/files/Government_Affairs/PLAStudies/McGowan Impact of Union Fringe Benefits on Nonunion Workers Under PLAs.pdf).

[16] *See* McGeary & Pellegrino, *supra* at note 13, at 431-34; Northrup & Alario, *supra*, note 12, at 22, 57-58.

CONCLUSION

The Ninth Circuit has dramatically and erroneously expanded the breadth of the market participant exemption to federal preemption. In so doing, the Ninth Circuit is not only bringing itself into conflict with the precedents of this Court and others, but is undermining the NLRA's prohibitions on top-down organizing in the construction industry specifically, and the supremacy of federal law generally. The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-56963
D.C. No. 8:04-cv-00280-JVS-MLG

MATT JOHNSON; MICHAEL SPIERING;
JAMES BIRMINGHAM,
Plaintiffs,

and

KEVIN CHAVEZ; JOSEPH NIGBOR; TRAVIS BARRETT;
WES BERTALAN; ASSOCIATED BUILDERS AND
CONTRACTORS OF SAN DIEGO, INC. ELECTRICAL
UNILATERAL APPRENTICESHIP COMMITTEE;
SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED
BUILDERS AND CONTRACTORS, INC. ELECTRICAL
UNILATERAL APPRENTICESHIP COMMITTEE,
Plaintiffs-Appellants,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT;
THE LOS ANGELES AND ORANGE COUNTIES BUILDING
AND CONSTRUCTION TRADES COUNCIL,
Defendants-Appellees,

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS UNION LOCAL 441,
ELECTRICAL APPRENTICESHIP PROGRAM,
Defendant.

Appeal from the United States District Court
for the Central District of California

James V. Selna, District Judge, Presiding

Argued and Submitted
May 4, 2010-Pasadena, California

Filed October 8, 2010

Before: Betty B. Fletcher and
Richard A. Paez, Circuit Judges, and
Donald E. Walter, District Judge.*

Opinion by Judge Paez

OPINION

PAEZ, Circuit Judge:

In 2003, Rancho Santiago Community College District ("the District") entered into a project labor agreement with the Los Angeles and Orange Counties Building and Construction Trades Council ("the Council") and its affiliated construction unions that governed labor relations for many District construction projects over a three-to-five-year period. The agreement required, among other things, that contractors use union "hiring halls" to obtain workers, that all workers on covered projects become union

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* The Honorable Donald E. Walter, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

members within seven days of their employment, and that all contractors and subcontractors working on covered projects agree to the project labor agreement and to the master labor agreement negotiated by the union for each craft. Seven individual non-union apprentices and two non-union apprenticeship committees filed suit challenging the agreement as preempted by the National Labor Relations Act ("NLRA") and the Employee Retirement Income Security Act ("ERISA") and as violative of their rights to substantive and procedural due process and to equal protection. The district court granted the defendants summary judgment on all claims.

Reviewing de novo, we hold that entering into the agreement constitutes market participation not subject to preemption by the NLRA or ERISA, and that the agreement did not violate the plaintiffs' rights to substantive or procedural due process or to equal protection. As a preliminary matter, we also reject the District's mootness and Eleventh Amendment sovereign immunity defenses. Specifically, we conclude that this appeal falls within the "capable of repetition, yet evading review" exception to mootness, and that the District waived any sovereign immunity defense by failing to pursue it while extensively litigating this suit on the merits. Accordingly, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2002, voters in the Rancho Santiago Community College District approved Ballot Measure E, which authorized the District to issue $337 million in general obligation bonds to fund improvements to the District's facilities. After voters approved the Measure, unions that had supported the Measure E campaign encouraged the District to enter into a

project labor agreement,[1] which would govern labor conditions for the subsequent construction. The District agreed and entered into a "Project Stabilization Agreement" ("PSA" or "the Agreement") with the Council and affiliated craft unions. Before entering into the Agreement, the District did not conduct any formal studies to determine its costs and benefits, but the District's Board of Directors heard testimony from many people in the community. According to the District's former construction manager, Robert Brown, the Board heard estimates that the PSA could increase costs by zero to thirty percent.

The PSA that the District ultimately executed covered all of the District's construction projects funded with Measure E funds that cost over $200,000. The Agreement applied to all covered projects initiated in a three-year period and would remain in effect for two additional years if neither party terminated it. According to the District, the PSA applied to twenty-seven projects, but the plaintiffs contend that these twenty-seven projects actually represent twenty-seven categories covering many more discrete projects.

Among other things, the PSA made the signatory unions the exclusive bargaining agents for all employees; established dispute-resolution mechanisms;

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[1] A project labor agreement is a pre-hire agreement between a construction project owner and a union or unions that a contractor must agree to before accepting work on the project and that establishes the terms and conditions of employment for the project. 51 Corpus Juris Secundum, Labor Relations § 311. Such agreements are common in the construction industry, where the short-term nature of employment impedes post-hire collective bargaining, and where contractors need predictable costs and a steady supply of skilled labor. *Id.*

required use of union "hiring halls" to obtain workers; required all workers on covered projects to start paying union dues within seven days of their employment; and prohibited strikes, picketing, and other disruptions. The Agreement further required all contractors and subcontractors working on a covered project to agree to the PSA and to the craft unions' master labor agreements, which required contractors to use the unions' apprenticeship programs and to contribute to union vacation, pension, and health plans. Finally, the PSA established a Work Opportunities Program that required the unions to establish an apprenticeship program for District residents, to encourage the referral and utilization of District residents as workers on covered projects, and to maximize opportunities for minority- and women-owned businesses.

In response to the District's approval of the PSA, seven individual apprentices not affiliated with a union ("the individual apprentices" or "the named apprentices") and two nonunion apprenticeship committees (collectively, "the plaintiffs") filed suit in March 2004 against the District, the Council, and the International Brotherhood of Electrical Workers Union 441's Electrical Apprenticeship Program ("Local 441") (collectively, "the defendants") in the federal district court for the Central District of California. The suit challenged the PSA on the grounds that it violated various state laws, that it was preempted by ERISA and the NLRA, and that it violated the named apprentices' rights to substantive and procedural due process and to equal protection as guaranteed by the U.S. Constitution. The original complaint sought declaratory and injunctive relief and attorney's fees and costs.

On the defendants' motion, the district court dismissed the state law claims against all defendants and dismissed all but the NLRA preemption claim against Local 441. The parties later agreed to dismiss Local 441 completely.

The defendants later moved for summary judgment on the merits or, in the alternative, partial summary judgment against five of the named apprentices whose claims were allegedly moot because they had graduated from their apprenticeship programs. In response, the plaintiffs amended their complaint to include a request for nominal damages to prevent the graduated apprentices' claims from becoming moot. Three of the named apprentices, however, agreed to dismiss all of their claims from the action.

The district court held that the prayer for nominal damages prevented the graduated apprentices' due process and equal protection claims from becoming moot, but granted the defendants' motion for summary judgment on those claims. After additional briefing, the district court also granted the defendants summary judgment on the ERISA and NLRA preemption claims, concluding that the PSA was exempt from preemption because it constituted state market participation, not regulation. The plaintiffs appealed.

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment. *Mortimer v. Baca*, 594 F.3d 714, 721 (9th Cir. 2010). Summary judgment is warranted when "the pleadings, the discovery and

disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). In deciding whether to affirm the grant of summary judgment, we must determine whether, "viewing the evidence in the light most favorable to the nonmoving party, . . . there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Mortimer*, 594 F.3d at 721 (internal quotations and citation omitted).

III. DISCUSSION

Before reaching the merits of the plaintiffs' claims, we must first address the defendants' contentions that this appeal is moot and that the District is entitled to sovereign immunity.

A. Mootness

The District contends that this appeal is moot because the PSA has expired and the District is not likely to enter into a new PSA, and because all the named apprentices have graduated. In general, a case is moot if there is no longer any "present controversy as to which effective relief can be granted." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007) (internal quotations and citation omitted). A case is not moot, however, if the challenged action is "capable of repetition, yet evading review." *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002). We conclude that the plaintiffs' challenge to the PSA falls within this exception to mootness.

As an initial matter, we note that the plaintiffs' prayer for nominal damages for their substantive due process, procedural due process, and equal protection

claims prevents those claims from becoming moot.[2] *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."). We therefore need only consider whether the expiration of the PSA or the graduation of the named apprentices renders moot the ERISA and NLRA preemption claims for injunctive and declaratory relief.

1. Expiration of the PSA

Despite the expiration of the PSA, we conclude that this appeal is not moot because the challenged conduct is "capable of repetition yet evading review." The "capable of repetition, yet evading review" exception to mootness applies "only where '(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.'" *Biodiversity Legal Found.*, 309 F.3d at 1173

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[2] The District contends that our decision in *Seven Words LLC v. Network Solutions*, 260 F.3d 1089 (9th Cir. 2001), prevents the prayer for nominal damages from saving the constitutional claims from mootness because the plaintiffs did not amend their complaint to request those damages until *after* the District moved to dismiss based on mootness. The District reads *Seven Words* too expansively. In *Seven Words*, we dismissed the plaintiff's appeal as moot where the plaintiff "never sought damages . . . (until a few days before argument in [the appeals] court)," "never [made] an effort to amend the complaint to include a damages claim," and had "effectively disavowed damages for tactical reasons." *Id.* at 1095, 1097. Here, by contrast, the plaintiffs amended their complaint to include a request for damages and never made any tactical decision not to request damages. Their failure to seek nominal damages in their original complaint therefore does not preclude the nominal damages request from preserving a live controversy over their constitutional claims.

(quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1993)). The challenged PSA satisfies both of these criteria.

First, the duration of the challenged PSA was "too short" to permit full litigation. The duration of a challenged action is "too short" where it is "almost certain to run its course before either this court or the Supreme Court can give the case full consideration." *Id.* The PSA had a term of three years, but remained in force for two additional years because neither party exercised its right to terminate it after the first three years. For purposes of determining whether the PSA's duration was so short as to evade review, we consider only the Agreement's mandatory three-year term. We have applied "the evading-review doctrine where the 'duration of the controversy is solely within the control of the defendant.'" *Anderson v. Evans*, 371 F.3d 475, 479 (9th Cir. 2004) (quoting *Biodiversity Legal Found.*, 309 F.3d at 1174). Similarly, here, because the PSA's extension for an additional two years was solely within the District's control, we will apply the evading-review doctrine if the duration not within its sole control—three years—would be too short to allow for full judicial review.

We have acknowledged that three years is generally too short to allow a case "seeking a declaratory judgment regarding the legality of [an agreement's] provisions [to] proceed beyond district court review." *Int'l Ass'n of Machinists & Aerospace Workers, Local Lodge 964 v. B.F. Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1050 (9th Cir. 2004). Indeed, the course of this litigation demonstrates that three years is too short for us or the Supreme Court to give the case full consideration; it has

already been pending for nearly six and a half years. Even without counting the three years in which the district court stayed the case pending Ninth Circuit and Supreme Court decisions, this litigation has taken over three years to reach us, and the Supreme Court has not yet had a chance to consider it. This case therefore satisfies the "evading review" portion of the "capable of repetition, yet evading review" doctrine.

Second, this case also satisfies the "capable of repetition" requirement. The defendants have not met their burden to show that there is no reasonable expectation that the plaintiffs will be subjected to a PSA again. *See Ackley v. W. Conference of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992) ("It is the defendant, not the plaintiff, who must demonstrate that the alleged wrong will not recur."). In support of its claim that it will never enter into a PSA again, the District offers only a declaration by its Vice Chancellor attesting that seventy-five percent of Measure E funds have been expended, that the remaining funds have been committed to projects that cannot be completed because of insufficient funds, that the District does not anticipate entering into a new PSA due to "present economic conditions," and that the passage of Measure E was "unprecedented" and, in his opinion, a "once in a lifetime event."[3] This

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[3] The defendants moved to supplement the record on appeal to include a declaration attesting to these facts, which were not before the district court. Although the court denied the motion in a clerk's order, we reconsider that decision sua sponte and grant the motion. Because the new facts that the defendants seek to establish bear on whether the controversy before us is moot, we exercise our discretion to supplement the record on appeal so that we may determine whether we have jurisdiction over the ERISA and NLRA claims for declaratory and injunctive

declaration does not adequately demonstrate that the District will not enter into a PSA again. Indeed, twenty-five percent of Measure E funds remain, and it would be unreasonable to assume that the District will never use those funds just because they currently lack sufficient funding to complete the projects to which those funds have been committed. Moreover, the Vice Chancellor's assertion that the District does not anticipate entering into a new PSA "[b]ecause of present economic conditions" implies that it may resume construction, and accordingly enter into a new PSA, once the economic situation improves.

Because the District has not shown that it will not enter into another PSA in the future, and because the duration of the PSA is too short to allow for full judicial review, the expiration of the PSA does not render the plaintiffs' claims for declaratory and injunctive relief moot.

2. Graduation of the Named Apprentices

We next consider whether the fact that the individual apprentices have graduated from their apprenticeship programs renders the ERISA and NLRA preemption claims moot as to them. At the outset, however, we note that whether the apprentices remain in this suit will not affect our analysis of the preemption issues or any relief we grant or deny. The plaintiff apprenticeship committees' claims of ERISA and NLRA preemption are identical to the individual apprentices' claims, and the apprentices'

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relief. *See Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (explaining that we may supplement the record on appeal where "developments [might] render a controversy moot and thus divest us of jurisdiction").

identities and particular circumstances are irrelevant to our analysis.

A case is moot when the "parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The apprentices retain a cognizable interest in the outcome of their NLRA preemption claim because that claim does not depend on their status as apprentices. The plaintiffs contend that sections 7 and 8 of the NLRA preempt the PSA under *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Sections 7 and 8 protect all employees, not just apprentices. *See* 29 U.S.C. §§ 157, 158 (NLRA §§ 7, 8). Because the named apprentices continue to work in the construction industry, they continue to enjoy the NLRA's protections and continue to have a cognizable interest in whether the NLRA preempts the PSA. Their NLRA preemption claim therefore is not moot as to them.

The individual apprentices' ERISA preemption claim, by contrast, does depend on their status as apprentices. They therefore lack a cognizable interest in the outcome of that claim, and the claim is accordingly moot as to them, unless their claim falls within the "capable of repetition, yet evading review" exception to mootness. To establish that their claim falls within that exception, however, the plaintiffs must demonstrate that there is a "reasonable expectation" that they will be subject to a PSA again in their capacity as apprentices. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). While the defendants have the burden to show they will not engage in the challenged conduct again, the plaintiffs have the

burden to show that they will be subject to the complained-of conduct in the future. *See Sample v. Johnson*, 771 F.2d 1335, 1342 (9th Cir. 1985). The plaintiffs have not met that burden. They do not allege that they intend to go through another apprenticeship program for another craft, but only that they "may" do so. Because this alleged possibility does not demonstrate a "reasonable expectation" that they will be subject to a PSA as apprentices again, we conclude that the named apprentices' ERISA preemption claim does not fall within the "capable of repetition, yet evading review" exception to mootness, and we accordingly dismiss that claim as to them.

B. Sovereign Immunity

The District contends that the Eleventh Amendment entitles it to sovereign immunity from the plaintiffs' claims seeking nominal damages. We conclude that the District has waived its sovereign immunity and therefore reject its Eleventh Amendment defense.[4]

A state waives its Eleventh Amendment immunity if it "unequivocally evidence[s its] intention to subject itself to the jurisdiction of the federal court." *Hill v. Blind Indus. & Servs. of Md.*, 179 F.3d 754, 758 (9th Cir. 1999). A state may waive its sovereign immunity through "conduct that is incompatible with an intent to preserve that immunity." *Id.* We have found that state defendants engaged in conduct "incompatible with" an intent to preserve sovereign immunity when

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[4] Absent a waiver, the District would be entitled to sovereign immunity because California community college districts constitute arms of the state entitled to sovereign immunity under the Eleventh Amendment. *See Cerrato v. S.F. Cmty. Coll. Dist.*, 26 F.3d 968, 972 (9th Cir. 1994).

they raised a sovereign immunity defense only belatedly, after extensive proceedings on the merits. For example, in *Hill*, we determined that the state waived sovereign immunity when the state did not raise the defense until the opening day of trial, after it had filed two motions to dismiss and an answer that did not assert the defense, consented to have a magistrate judge try the case, conducted discovery, moved to compel discovery and for sanctions, participated in a pre-trial conference, and filed trial materials. *Id.* at 756. Similarly, in *In re Bliemeister*, 296 F.3d 858 (9th Cir. 2002), we found that the state waived immunity when it filed a limited response, an answer, and a motion for summary judgment; attended an oral hearing and argued the merits; and heard the court announce its preliminary leanings, all without raising the sovereign immunity defense. *Id.* at 862.

Like the defendants in *Hill* and *Bliemeister*, the District engaged in extensive proceedings in the district court without seeking dismissal on sovereign immunity grounds. Although it baldly asserted in its Answer that it was "immune from liability pursuant to the provisions of the Eleventh Amendment of the United States Constitution," the District litigated the suit on the merits, participated in discovery, and filed a motion to dismiss and a summary judgment motion without pressing a sovereign immunity defense. Although the District asserted its sovereign immunity in its opposition to the plaintiffs' application to file an amended complaint to include a prayer for nominal damages, it did not assert a sovereign immunity defense in the summary judgment briefing

filed after the plaintiffs amended their complaint.[5] In circumstances like these, we deem the defendant to have made a tactical decision to delay asserting the sovereign immunity defense. *See Bliemeister*, 296 F.3d at 862. Such tactical delay "undermines the integrity of the judicial system[,] . . . wastes judicial resources, burdens jurors and witnesses, and imposes substantial costs upon the litigants." *Hill*, 179 F.3d at 756. Having chosen "to defend on the merits in federal court," the District will "be held to that choice." *See id.* at 758. We accordingly hold that the District has waived its sovereign immunity defense.

C. Merits

Having concluded that this appeal is not moot, and that the District has waived its sovereign immunity, we proceed to consider the merits of the plaintiffs' claims.

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[5] The District contends that it was "not required" to raise its Eleventh Amendment defense until the plaintiffs sought retrospective damages relief, and that the proceedings on the merits before the plaintiffs sought that relief therefore were not inconsistent with an intent to preserve its sovereign immunity. This argument appears to stem from an erroneous belief that the District could not have asserted immunity from the plaintiffs' claims for prospective relief. Although state *officers* sued in their official capacities are immune only from suits for retrospective relief, *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) (explaining the doctrine of *Ex parte Young*, 209 U.S. 123 (1908)), state *entities* are immune from suit "regardless of the nature of the relief sought," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). As a state entity, the District thus could and should have asserted sovereign immunity before the plaintiffs amended their complaint to request nominal damages.

1. ERISA and NLRA Preemption Claims

Whether federal law preempts a particular state action is fundamentally a question of congressional intent. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1039-40 (9th Cir. 2007). Federal law will preempt state laws that "interfere with, or are contrary to, federal law" only if "that was the clear and manifest purpose of Congress." *Id.* at 1039-40 (internal quotations and citation omitted). The so-called "market participant doctrine" offers us a presumption about Congress's purposes. In general, Congress intends to preempt only state regulation, and not actions a state takes as a market participant. *See Bldg. & Constr. Trades Council v. Associated Builders and Contractors of Mass./R.I., Inc. ("Boston Harbor")*, 507 U.S. 218, 227 (1993); *Engine Mfrs.*, 498 F.3d at 1042. This doctrine applies to claims of NLRA and ERISA preemption. *See Boston Harbor*, 507 U.S. at 227 (NLRA); *Associated Gen. Contractors of Am. v. Metro. Water Dist. of S. Cal.* ("MWD"), 159 F.3d 1178, 1182 (9th Cir. 1998) (ERISA). In assessing the plaintiffs' preemption claims, we therefore must first determine whether the District acted as a regulator or as a market participant when it entered into the PSA. Because we conclude that the District acted as a market participant, the plaintiffs' ERISA and NLRA pre-emption claims fail at the threshold.[6]

In general, state action falls within the market participant exception to preemption when the state entity directly participates in the market by purchasing goods or services. *See Engine Mfrs.*, 498 F.3d at 1040 (describing the "single inquiry" in market

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[6] We therefore need not decide whether the NLRA or ERISA would preempt the PSA if it were regulation.

participant cases as "whether the challenged program constituted direct state participation in the market"). But the line between non-preempted market participation and preempted regulation is not always so clear, and a state's direct participation in the market will not always escape preemption. If a state's direct participation in the market is "tantamount to regulation," the market participant doctrine will not exempt the state's action from preemption. *Wis. Dep't of Indus., Labor & Human Relations v. Gould*, 475 U.S. 282, 289 (1986). Thus, in *Gould*, the Supreme Court held that the NLRA preempted a state law forbidding state procurement agents from using state funds to do business with companies that had repeatedly violated the NLRA, even though the law constrained only the state's own participation in the market. *Id.* at 283-84, 287. The Court explained that the state law "on its face . . . serves plainly as a means of enforcing the NLRA," and that "[n]o other purpose could credibly be ascribed." *Id.* at 287. Because the law imposed a "supplemental sanction" on NLRA violations, it contravened Congress's intent to bar states from "providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." *Id.* at 286-89 (describing the preemption rule of *Garmon*, 359 U.S. 236).

In light of *Gould*, to determine whether a state entity's direct participation in the market falls within the market participant exception to preemption, we must determine whether the state action is simply proprietary or "tantamount to regulation." As a guide to making this determination, we have adopted the two-prong test that the Fifth Circuit established in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999). *See Engine Mfrs.*, 498 F.3d at 1041; *Olympic Pipe Line*

Co. v. City of Seattle, 437 F.3d 872, 881 (9th Cir. 2006). The *Cardinal Towing* test offers two questions to help determine whether state action constitutes market participation not subject to preemption:

> First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

Id. As the Fifth Circuit explained, these questions "seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." *Id.*

In applying this test, we have not yet conclusively settled whether a state action must satisfy both prongs, or only one, to qualify as market participation exempt from preemption. We held in *Lockyer* that "a state need not satisfy both questions," but we subsequently vacated that opinion after the Supreme Court reversed it on other grounds. *See Chamber of Commerce v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006) (*en banc*), *rev'd on other grounds sub nom. Chamber of Commerce v. Brown*, 128 S. Ct. 2408 (2008) and *vacated by* 543 F.3d 1117 (2008). Although we are not bound by our vacated decision in *Lockyer*, we find its reasoning persuasive and accordingly hold that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption. As we pointed out

in *Lockyer*, the first *Cardinal Towing* question "looks to the *nature* of the expenditure" and "protects comprehensive state policies with wide application from preemption, so long as the type of state action is essentially proprietary." *Id.* at 1084 (emphasis added). The second question looks to the "*scope* of the expenditure" and "protects narrow spending decisions that do not necessarily reflect a state's interest in the efficient procurement of goods or services, but that also lack the effect of broader social regulation." *Id.* (emphasis added). The *Cardinal Towing* test thus offers two alternative ways to show that a state action constitutes non-regulatory market participation: (1) a state can affirmatively show that its action is proprietary by showing that the challenged conduct reflects its interest in efficiently procuring goods or services, or (2) it can prove a negative—that the action is *not* regulatory—by pointing to the narrow scope of the challenged action. We see no reason to require a state to show both that its action is proprietary and that the action is *not* regulatory.

In any event, we conclude that the PSA challenged here satisfies both prongs of the *Cardinal Towing* test and accordingly is not subject to preemption by the NLRA and ERISA.

a. Efficient procurement of goods and services, as measured by comparison to private market behavior

The plaintiffs contend that the PSA does not meet the first *Cardinal Towing* prong both because it does not reflect the District's interest in "efficient procurement" of goods and services and because it is not comparable to private market behavior. In particular, they first contend that a state entity can have no interest in "efficient procurement" when it

spends federal funds and that the Agreement as a whole simply pays off political supporters without actually providing the District with any benefits in terms of "efficient procurement." Second, they contend that no private party would have entered into an agreement providing so few benefits and that no private party in the District's position could have lawfully entered into such an agreement.

These contentions rely on too narrow an understanding of what counts as an interest in "efficient procurement" and of how similar a challenged state action must be to private market behavior to qualify as non-preempted market participation under *Cardinal Towing*'s first prong. Even if the plaintiffs' contentions were true, they would not render the District's direct participation in the market essentially regulatory. Under a proper understanding of *Cardinal Towing*'s first prong, we conclude that the PSA reflects the District's interest in the efficient procurement of goods and services, as measured by comparison to typical private market behavior.

i. Efficient procurement

At the outset, we reject the plaintiffs' suggestion that the PSA cannot reflect the District's interest in "efficient procurement" to the extent it applies to a construction project funded in part by federal monies. In support of this contention, the plaintiffs point to the Second Circuit's decision in *Healthcare Association of New York State, Inc. v. Pataki*, 471 F.3d 87 (2d Cir. 2006), which held that a state regulation barring the use of state-appropriated funds to encourage or discourage union organizing was preempted to the extent it applied to federal funds that merely passed through the state. *Id.* at 90-91, 109. Contrary to the plaintiffs' reading, however, *Pataki* does not suggest

that a state can never have a proprietary interest in the efficient procurement of goods and services when it uses federal money. Rather, *Pataki* holds that, although a state has a proprietary interest in "sav[ing] money" and "getting what [it] paid for" with its own funds, it does not have a similar interest in saving another government entity's money. *Id.* at 109. Here, the District does not claim a proprietary interest in "getting what [it] paid for," but rather in completing construction projects without labor disruptions. We have no doubt that this is a legitimate interest in "efficient procurement" whether the state agency expends its own funds or funds that the federal government has given it.

The plaintiffs further contend that the PSA does not advance an interest in efficient procurement because it presents several downside risks while offering no benefits in terms of costs, labor availability, or timeliness for the construction. Whether the PSA's benefits outweighed its costs, however, bears only on whether the District made a good business decision, not on whether it was pursuing regulatory, as opposed to proprietary, goals. We must keep in mind that congressional intent is the touchstone of our preemption analysis, *Engine Mfrs.*, 498 F.3d at 1040, and we have no reason to think that Congress intended to allow beneficial state contracts while preempting similar contracts in which the state got a bad deal.

Moreover, we have made clear that "efficient procurement" under *Cardinal Towing*'s first prong does not necessarily mean "cheap" procurement, but rather "procurement that serves the state's purposes." *Engine Mfrs.*, 498 F.3d at 1046. Thus, in *Engine Manufacturers*, we upheld as lawful market parti-

cipation a state rule requiring state and local government entities to ensure that any new street sweepers, garbage trucks, and other vehicles that they procured met specified emissions standards. *Id.* at 1035, 1048. Even though the state entity pursued environmental, as opposed to economic, goals through its participation in the market, the market participant doctrine still applied.

Gould, however, necessarily places limits on what can qualify as an interest in "efficient procurement" under *Cardinal Towing*'s first prong. Although "efficient procurement" means "procurement that serves the state's purposes," *id.*, pursuit of some purposes will make a state's participation in the market "tantamount to regulation." *Gould*, 475 U.S. at 289. In *Gould*, the state enacted a statute forbidding government procurement agencies from doing any business with labor law violators. *Id.* at 283-84. Despite the state's assertion that it was acting as a market participant, the Supreme Court concluded that the law "unambiguously" acted as a "supplemental sanction" for violations of the NLRA, and was preempted. *Id.* at 288. *Gould* establishes that, where the state seeks to affect private parties' conduct unrelated to the performance of contractual obligations to the state, the state's direct participation in the market does not reflect its interest in "efficient procurement" of goods and services. *See id.* at 189 (explaining that "[i]t is the conduct being regulated . . . that is the proper focus of concern" (internal quotations and citation omitted)); *see also Boston Harbor*, 507 U.S. 228-29 (describing the statute in *Gould* as "address[ing] employer conduct unrelated to the employer's performance of contractual obligations to the state"); *see also Bldg. and Constr. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 36 (D.C. Cir.

2002) ("A condition that the Government imposes in awarding a contract or in funding a project is regulatory only when, as the Supreme Court explained in *Boston Harbor*, it 'addresse[s] employer conduct unrelated to the employer's performance of contractual obligations to the [Government].'" (alterations in original) (quoting *Boston Harbor*, 507 U.S. at 228-29)).

Unlike the regulation in *Gould*, nothing on the face of the PSA indicates that it serves purely regulatory purposes unrelated to the performance of contractual obligations to the state. The PSA does not reward or sanction private parties for their conduct in the private market, but rather addresses only how construction contractors and subcontractors will perform work on the District's projects. Plaintiffs contend that the PSA's primary purpose was to reward the unions that supported the Measure E campaign. Yet, the District intended for the PSA to serve legitimate proprietary goals, including containing costs, optimizing productivity, and boosting the economy. Private parties undertaking large construction projects commonly enter into pre-hire project labor agreements like the PSA challenged here. Whether or not plaintiffs are correct that the District had ulterior motives in adopting the PSA, we are quite certain that Congress did not intend for the NLRA's or ERISA's preemptive scope to turn on state officials' subjective reasons for adopting a regulation or agreement. *Cf. N. Ill. Chapter of Associated Builders and Contractors, Inc. v. Lavin*, 431 F.3d 1004, 1007 (7th Cir. 2005) ("Federal preemption doctrine evaluates what legislation *does*, not why legislators voted for it or what political coalition led to its enactment." (emphasis in original)).

ii. Comparison to private market behavior

The plaintiffs next contend that the PSA cannot satisfy *Cardinal Towing*'s first prong because it is not sufficiently comparable to private market behavior. In particular, they contend that no private party would have entered into a project labor agreement providing so few benefits and that no private party in the District's position could have lawfully entered into such an agreement. However, even if true, those considerations would not preclude the PSA from being sufficiently analogous to private market behavior to satisfy *Cardinal Towing*'s first prong.

First, the plaintiffs' contention that no private party would have entered into a deal with so few benefits again reflects its misunderstanding that Congress intended to allow state market participation to escape preemption only where the state gets a good deal. As explained above, whether the PSA was a good deal for the District does not bear on whether the Agreement is regulatory or proprietary. Indeed, we cannot credibly ascribe to Congress an intent to use preemption to impose economic rationality on state contracting decisions.

Second, the plaintiffs also miss the mark in contending that a private purchaser in the District's position could not have lawfully entered into the PSA because the NLRA bars such pre-hire agreements unless the contracting party is an "employer engaged primarily in the building and construction industry," which a school district is not.[7] *See* 29 U.S.C. § 158(f).

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[7] The parties dispute whether a private owner-developer could lawfully enter into an agreement like the PSA here. Because we conclude that the legality of analogous private party

This provision of the NLRA does not mean that the District's entry into the PSA is not market participation; it simply means that the District can participate in the market in a way in which private parties cannot. The NLRA itself creates this disparity by explicitly excluding states and their political subdivisions from the NLRA's prohibitions. *See id.* § 152(2) ("the term 'employer' . . . shall not include . . . any State or political subdivision thereof"); § 158(a) (providing that "[i]t shall be an unfair labor practice for *an employer*" to engage in certain enumerated actions (emphasis added)). Were we to hold, as the plaintiffs urge, that a state's direct participation in the market becomes "regulation" subject to preemption whenever a private party could not lawfully participate in the market in the same way, we would effectively subject state employers to the NLRA's proscriptions. This would conflict with the clear congressional intent to exempt state employers from the NLRA's reach.

Contrary to the plaintiffs' suggestion, the Supreme Court's statement in *Boston Harbor* that Congress does not preempt state proprietary action "where analogous private conduct would be permitted" does not suggest otherwise. *See Boston Harbor*, 507 U.S. at 231-32. In *Boston Harbor*, the Court upheld as lawful market participation a state agency's requirement that all contractors working on the cleanup of Boston Harbor agree to a project labor agreement that the agency's construction management company had negotiated with a labor union. *Id.* at 221-22, 232. The agreement in *Boston Harbor*, unlike the PSA here, fell squarely within NLRA provisions exempt-

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conduct is not relevant to the question before us, we need not resolve this dispute.

ing construction industry employers from the prohibition of pre-hire agreements because the state agency's project management company, rather than the agency itself, entered into the agreement with the union. *Id.* at 221-22. But the Court in no way suggested that the fact that the project manager, rather than the agency, entered into the agreement was dispositive. To the contrary, the basis for the Court's holding was Congress's clear intent to "accommodate conditions specific to [the construction] industry," including the short-term nature of employment that impeded post-hire collective bargaining and the contractor's need for predictable costs and a steady labor supply. *Id.* at 231. In light of the "general goals behind the passage of [these provisions]," the Court concluded that Congress did not intend to preempt state entities from adopting such agreements for state construction projects, while allowing such agreements in the construction industry generally. *Id.* at 231-32.

Indeed, the identity of the parties who signed the project labor agreement in *Boston Harbor* only formally distinguishes that agreement from the PSA here. The agreements' practical effects are the same. Here, as in Boston Harbor, a pre-hire agreement binds all contractors and subcontractors working on covered projects. Moreover, the agency in *Boston Harbor* "approved and adopted" the labor agreement, which the project manager had entered into "on [the agency's] behalf," and, like the District, required all bidders to submit to the agreement as a condition of accepting work on the project. *Id.* at 222. *Boston Harbor* makes clear that congressional intent controls our preemption analysis, *see id.* at 224, 231, and we find no indication in the NLRA that Congress intended to allow state entities to adopt project labor

agreements only if they use a construction-industry middleman exempt from the NLRA's proscriptions.

In sum, we hold that the District's PSA reflects its interest in the efficient procurement of goods and services, as measured by comparison to typical private market behavior. It therefore qualifies as market participation exempt from preemption under *Cardinal Towing*'s first prong.

b. Narrow scope

We further conclude that the PSA challenged here is sufficiently narrow in scope that it qualifies as non-preempted market participation under *Cardinal Towing*'s second prong.

Despite covering many individual construction projects, the PSA limited its reach to construction projects costing over $200,000 that were paid for with the $337 million of Measure E funds and that were initiated during the three-year term of the agreement. This is undoubtedly narrower than the agreement approved in *Boston Harbor*, which covered $6.1 billion of spending over ten years. *Id.* at 221. Although the agreement approved in *Boston Harbor* covered the "one particular job" of cleaning up Boston Harbor, that one job almost certainly could have been characterized as many component projects. *Boston Harbor*, 507 U.S. at 232. Likewise, here, the PSA could be characterized as covering the single project of improving campus facilities.

Moreover, the PSA's substantive scope is very similar to the *Boston Harbor* agreement's. *See id.* at 232. Like the District's PSA, the *Boston Harbor* agreement recognized one exclusive bargaining agent, specified dispute-resolution mechanisms, required all employees to become union members within seven

days of their employment, required use of the union's hiring halls to supply the labor force, prohibited strikes for the term of the agreement, bound all contractors and subcontractors to the agreement, and prescribed the benefits that workers would receive for the duration of the project. *Id.* at 221-22; *see also* Brief for Petitioners at 7, *Boston Harbor*, 507 U.S. 218 (1993) (No. 91-261), 1992 WL 511837.

The District's Agreement does, however, contain one set of provisions that the *Boston Harbor* agreement did not appear to have: provisions requiring the parties to maximize work opportunities for the District's residents and for minority- and women-owned businesses. Specifically, the Agreement required signatory unions to establish apprenticeship programs for District residents, to encourage District residents to enter those programs, and to encourage the utilization of District residents on the projects covered by the PSA. These provisions do not render the PSA too broad to qualify as market participation under *Cardinal Towing*'s "narrow scope" test; they are simply part of the consideration that the unions provided in exchange for the benefits they received under the Agreement. This conclusion accords with the Supreme Court's decision in *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983), that a city acted as a market participant not subject to the dormant Commerce Clause when it adopted an executive order requiring that certain percentages of workers on city-funded public construction projects be city residents, minorities, and women. *Id.* at 206, 214.

We therefore conclude that the District's PSA is sufficiently narrow to qualify as market participation exempt from preemption under *Cardinal Towing*'s

second prong. Because entering into the PSA qualifies as market participation—under both prongs of the *Cardinal Towing* test—it is not subject to preemption by ERISA or the NLRA. We accordingly affirm the grant of summary judgment for the defendants on the preemption claims.

2. Substantive and Procedural Due Process Claims

The plaintiffs contend that the PSA violated their rights to substantive and procedural due process by depriving them of liberty and property interests protected by the Fourteenth Amendment. To succeed on a substantive or procedural due process claim, the plaintiffs must first establish that they were deprived of an interest protected by the Due Process Clause. *See Shanks v. Dressely*, 540 F.3d 1082, 1087 (9th Cir. 2008) (substantive due process); *Kildare v. Saenz*, 325 F.3d 1078, 1085 (9th Cir. 2003) (procedural due process). We conclude that the plaintiffs cannot make this threshold showing and accordingly affirm the grant of summary judgment to the defendants on the due process claims.

a. Claimed Liberty Interest

The plaintiffs first contend that the PSA deprived them of their protected liberty interest in pursuing careers as electricians by "categorically disqualif[ying] them and render[ing] them ineligible for virtually any Rancho Santiago construction work for three years." The Due Process Clause does indeed protect the plaintiffs' liberty interest in pursuing their careers as electricians. *See Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972) (holding that the Due Process Clause protects the right to "engage in the

common occupations of life"). The PSA, however, did not deprive the plaintiffs of that interest.

The Supreme Court made clear in *Board of Regents v. Roth* that merely declining to rehire someone does not infringe on his liberty interest in pursuing a career because the person "remains free as before to seek another" job. *Id.* at 575. Rather, the government violates this liberty interest only when it "foreclose[s the person's] freedom to take advantage of other employment opportunities," for instance by barring him or her from "all other public employment." *Id.* at 573-74. By extension, then, declining to hire someone in the first instance does not infringe any protected liberty interest so long as the decision does not bar the person from all public employment or otherwise foreclose him from seeking other job opportunities.

The plaintiffs contend that the PSA violated their liberty by effectively barring them from working on a significant portion of the District's construction projects for three years. This contention fails for two reasons. First, the plaintiffs were not excluded from all public employment on the District's projects; they still had the opportunity to work on non-Measure E-funded projects and on Measure E projects costing less than $200,000. Second, and more importantly, the plaintiffs were not actually excluded from working on the projects covered by the PSA: the non-union apprentices remained free to join a union apprenticeship program qualified to provide workers for those projects. The PSA therefore did not violate the plaintiffs' liberty interest in pursuing their careers as electricians.

b. Claimed Property Interests

The plaintiffs also contend that the PSA deprived them of three protected property interests: (1) their interest in remaining eligible to work on the District's construction projects, (2) their interest in a state-funded education, and (3) their interest in the credits, job hours, and training they had earned through their non-union apprenticeship programs. We conclude that the PSA did not deprive the plaintiffs of any such protected property interests.

First, the plaintiffs have not even made the threshold showing that the Due Process Clause protects their interest in remaining eligible to work on the District's construction projects. Protected property interests "are not created by the Constitution[, but r]ather . . . they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Roth*, 408 U.S. at 577. State law creates a property interest protected by the Due Process Clause where it creates a "legitimate claim of entitlement" to a particular benefit. *Id.* A legitimate claim of entitlement "is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms." *Wedges/Ledges of Cal., Inc. v. Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (quoting *Ass'n of Orange Co. Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983)). Although the plaintiffs contend, without explanation, that the "net effect" of a variety of California laws confers on them an entitlement to remain eligible for work on the District's projects, they point to no law that even comes close to mandating that non-union apprentices remain eligible for all construction projects. We therefore conclude that the plaintiffs have no protected property

interest in remaining eligible to work on the District's projects.

Second, even if California law confers a protected property interest in a state-funded education, the plaintiffs do not explain how the PSA deprived them of that interest. Indeed, the plaintiffs clearly could not show that they suffered a deprivation of their purported right to an education, as they have all graduated. We accordingly reject this claim.

Third, even if California law creates protected property interests in the credits, job hours, and training that the named apprentices earned through their non-union apprenticeship programs, the PSA did not deprive them of those interests. The PSA did not kick the plaintiffs out of their apprenticeship programs or strip them of their credits and training hours. At most, the PSA required the plaintiffs to put some of their credits and training hours in jeopardy if they chose to transfer to another apprenticeship program so that they could work on PSA-covered projects. This loss would have resulted from the apprentices' choice to transfer programs, not from the PSA itself.

In sum, the PSA did not deprive the plaintiffs of any liberty or property interest protected by the Due Process Clause. We accordingly affirm the grant of summary judgment to the defendants on the plaintiffs' due process claims.

3. Equal Protection Claim

Finally, the plaintiffs contend that the PSA violated their rights to equal protection because it treated them differently than union-affiliated apprentices. The parties agree, as they must, that

rational basis scrutiny applies to this claim.[8] *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (explaining that rational basis scrutiny applies to equal protection claims "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage"). State action will survive rational basis scrutiny if it is "rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Under rational basis review, the state actor "has no obligation to produce evidence to sustain the rationality of a statutory classification; rather, the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1280 (9th Cir. 2004) (internal quotations, alteration, and citation omitted).

The plaintiffs have not met this burden. The plaintiffs contend that the PSA fails the rational basis test because it was not rationally related to the District's claimed legitimate interest in avoiding labor disruptions. In support of this contention, they point to evidence that the District did not analyze the PSA's "true cost impact." This contention misses the mark. First, the Equal Protection Clause "allows the States wide latitude" with economic decisions, and

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[8] The District contends that the PSA does not constitute state action subject to the Equal Protection Clause because it constitutes market participation, not regulation. The market participation doctrine, however, applies only to the Commerce Clause and preemption. *See Engine Mfrs.*, 498 F.3d at 1040. The District offers no authority suggesting that states need not abide by the Equal Protection Clause when they are acting as market participants.

"presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440 (internal citations omitted). Thus, even if the District's purported failure to fully analyze the PSA's costs resulted in an improvident decision, the Equal Protection Clause will not invalidate it. Second, to survive rational basis scrutiny, a state action need not *actually* further a legitimate interest; it is enough that the governing body "*could have rationally decided that*" the action would further that interest. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (emphasis in original). Here, even if the PSA did cost the District more than it was worth, the District could have rationally believed that the PSA would promote its legitimate interest in avoiding labor disruptions. Indeed, the PSA plainly contains provisions that serve that goal by prohibiting work stoppages, strikes, and other disruptions.

Because we conclude that the PSA was rationally related to the District's legitimate interest in preventing labor disruptions, we affirm the grant of summary judgment to the defendants on the plaintiffs' Equal Protection Claim.

IV. CONCLUSION

In sum, we conclude that this appeal is not moot and that the District has waived any claim to sovereign immunity. Because we conclude that the PSA falls within the market participant exception to preemption, we affirm the grant of summary judgment to the defendants on the ERISA and NLRA preemption claims. We also affirm the grant of summary judgment to the defendants on the plaintiffs' substantive and procedural due process claims because the plaintiffs have not shown that the District

deprived them of any constitutionally protected liberty or property interest. Finally, we conclude that the PSA was rationally related to the District's legitimate interest in avoiding labor disruptions and accordingly affirm the grant of summary judgment to the defendants on the Equal Protection claim.

DISMISSED in part; AFFIRMED in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

Case No.: SACV 04-00280 JVS (MLGx)

MATT JOHNSON; MICHAEL SPIERING;
KEVIN CHAVEZ; JOSEPH NIGBOR; TRAVIS BARRETT;
JAMES BIRMINGHAM; AND WES BERTALAN;
ASSOCIATED BUILDERS & CONTRACTORS OF SAN DIEGO,
INC. ELECTRICAL APPRENTICESHIP COMMITTEE;
SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED
BUILDERS AND CONTRACTORS, INC. ELECTRICAL
UNILATERAL APPRENTICESHIP COMMITTEE,
Plaintiffs,

vs.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT;
THE LOS ANGELES AND ORANGE COUNTIES BUILDING
AND CONSTRUCTION TRADES COUNCIL; AND
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS UNION LOCAL 441, ELECTRICAL
APPRENTICESHIP PROGRAM,
Defendants.

Complaint Filed: 3/9/2004
Judge Hon. James v. Selna
Dept. 10-C

JUDGMENT

This action came on before the Court, on December 9, 2005, and October 20, 2008, the Honorable James V. Selna, District Judge Presiding, on a Motion for

Summary Judgment, and the evidence presented having been fully considered, the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing, that the action be dismissed on the merits and that defendants, LOS ANGELES/ ORANGE COUNTIES BUILDING AND CONSTRUCTION TRADES COUNCIL and RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT, a public entity, recover their costs.

DATED: November 04, 2008

/s/ James V. Selna
James V. Selna
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 04-0280- JVS (MLGx)

Date October 23, 2008

Title *Matt Johnson, et al. v. Rancho Santiago Community Colleg District, et al.*

Present: The Honorable James V. Selna

Karla J. Tunis	Not Present
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Not Present	Not Present

Proceedings: *Hearing Regarding Market Participant Doctrine Portion of Defendant's Summary Judgment Motion filed 4-12-05*

Defendant Rancho Santiago Community College District, *et al.*, (the "District") previously filed a motion for summary judgment against Plaintiff Matt Johnson, *et al.* ("Johnson"). On January 11, 2006, this Court issued an order granting summary judgment on all issues presented except for the issue of whether the District was acting as a market participant when it entered the Project Stabilization

Agreement ("PSA").[1] The Court now reexamines whether the District acted as a market participant in light of new case law.

I. BACKGROUND

In 2002, District voters approved Measure E, which authorized the issuance of $337 million in general obligation bonds for use on various construction projects. The District subsequently entered into a PSA to cover construction projects funded by Measure E, including construction of new classroom facilities, and the repair and renovation of existing classrooms, laboratories, centers, and support facilities ("Measure E projects").

The PSA contains promises by the Los Angeles and Orange Counties Building and Construction Trade Council and its affiliated individual construction unions that they will not strike, that they will arbitrate jurisdictional disputes among the various craft unions, and that they will continue to work on the projects despite the expiration of a local collective bargaining agreement and a management rights clause. In exchange for these promises, the District agreed to require contractors who performed work under the PSA to be bound to its terms and conditions.

Johnson asserts that the PSA is preempted by ERISA and the National Labor Relations Act

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[1] A PSA is "an example of a type of prehire agreement designed for large and complex construction projects. It is designed to eliminate potential delays resulting from labor strife, to ensure a steady supply of skilled labor on the project, and to provide a contractually binding means of resolving worker grievances." *Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n*, 21 Cal. 4th 352, 359 (1999).

("NLRA"). The resolution of both of these claims depends on whether the District was acting as a regulator when it entered in the PSA, or merely as a market participant.

II. LEGAL STANDARD

Summary judgment is appropriate only where the record, read in the light most favorable to the non-moving party, indicates that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Material facts are those necessary to the proof or defense of a claim, and are determined by reference to substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. In deciding a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and are not to be engaged in by the Court in deciding a summary judgment motion. *Id.*

The burden initially is on the moving party to demonstrate an absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If, and only if, the moving party meets its burden, then the non-moving party must produce enough evidence to rebut the moving party's claim and create a genuine issue of material fact. *See id.* at 322-23. If the non-moving party meets this burden, then the motion will be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Co., Inc.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

III. DISCUSSION

A. This Court's January 11, 2006 Order

In the 2006 Order, this Court applied *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686 (5th Cir. 1999) to evaluate whether the District acted as a market participant.

In *Cardinal Towing*, the Fifth Circuit adopted the following test to determine whether the government has acted as a market participant:

> First, does the challenged action essentially reflect the entity's own interest in the efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem?

(*Id.* at 693.)

In 2006, this Court found that there was a genuine issue of material fact as to the first prong. (Order, p. 7.) The Court held that although on its face the PSA attempts to achieve the efficient and successful completion of the Measure E projects, the declaration of Gifford Carey raises questions as to whether a private entity would enter into an agreement with the characteristics of the PSA. (*Id.* at 6; Carey Decl., ¶ 7.)

The Court found, however, that the second prong was satisfied. (Order, p. 10.) The Court dismissed Johnson's argument that the PSA is "anything but narrow" because it applies to over 50 projects. (*Id.* at 7.) The Court explained that the "the relevant

inquiry for the second prong of the *Lockyer* analysis is the *scope of the expenditure*." Order, p. 8; *Chamber of Commerce of U.S. v. Lockyer*, 364 F.3d 1154, 1163 (9th Cir. 2004). The Court then concluded that because the second but not the first prong was satisfied, there was a material issue of fact as to whether the District acted as a market participant. (Order, p. 10.) In other words, this Court interpreted the *Cardinal Towing* test as requiring both prongs to be satisfied before concluding that a government entity acted as a market participant.

B. The *Cardinal Towing* Test

The District first argues that summary judgment in its favor is proper in light of recent case law. (District's Mot. p. 3.) Following the Court's 2006 Order, the Ninth Circuit held that "[e]ach question [of the *Cardinal Towing* test] constitutes a separate method of determining whether the state action at issue actually constitutes regulation, and a state need not satisfy both questions to be deemed to act as a market participant." *Chamber of Commerce of U.S. v. Lockyer*, 463 F.3d 1076, 1084 (9th Cir. 2006). The United States Supreme Court subsequently reversed *Lockyer* in *Chamber of Commerce of U.S. v. Brown*, 554 U.S. __, 128 S.Ct. 2408 (2008). However, the Supreme Court did not address whether both prongs of the *Cardinal Towing* test must be met, reversing on other grounds. Indeed, the Supreme Court did not overturn the Ninth's Circuit's finding that the California acted as a regulator and not as a market participant. On remand, the Ninth Circuit vacated its decision in *Lockyer* in light of *Brown*. 2008 U.S. App. LEXIS 19558 (9th Cir. 2008).

The District correctly points out that the Ninth Circuit reaffirmed its interpretation of *Cardinal*

Towing in *Engine Manufacturers Association v. South Air Quality Management District*, 498 F.3d 1031 (9th Cir. 2007). In *Engine Manufacturers Association*, the court stated that in "[*Lockyer*], we held that state action qualifies as proprietary in either of two circumstances," referring to the two prongs of the *Cardinal Towing* test. *Engine Manufacturers Association*, 498 F.3d at 1041. The use of the word "either" indicates that state action qualifies as proprietary if it meets either the first *or* the second prong.

The District argues, therefore, that because the Court found that the second prong of *Cardinal Towing* was satisfied, the Court should order summary judgment in its favor. (District's Mot. p. 8.)

In response, Johnson argues that this Court should not rely on the Ninth Circuit's decision in *Lockyer* or *Engine Manufacturers Association* because the Supreme Court not only reversed but subsequently vacated the Ninth Circuit's decision in *Lockyer*.[2] Johnson's Reply p. 2; 2008 U.S. App. LEXIS 19558 (9th Cir. 2008). Indeed, in *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n. 2 (9th Cir. 1991), the court held that "[a]lthough the Authority contends that the decision was 'vacated on other grounds,' we find that contention curious. A decision may be reversed on other grounds, but a decision that has been vacated has no precedential authority whatsoever."

Johnson correctly argues that *Lockyer* is no longer binding precedent. (Johnson's Reply p. 2.) However, this Court nevertheless relies on *Lockyer* and *Engine*

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[2] The actual language in Johnson's brief refers to the Ninth Circuit's holding in *Brown*. (Johnson Reply p. 2, lines 8-12.) The Court assumes this is an error and that Johnson intended to refer to the Ninth Circuit's holding in *Lockyer*.

Manufacturers Association as persuasive authority. In *Hart v. Massanari*, 266 F.3d 1155, 1159 (9th Cir. 2001), the Ninth Circuit held that a vacated opinion continues to have persuasive force.

In *Lockyer* and *Engine Manufacturers Association*, the Ninth Circuit interpreted *Cardinal Towing* and clearly found that both prongs of the test need not be satisfied. Neither the Ninth Circuit nor the Supreme Court has disagreed with that interpretation. There is no reason for this Court to believe that interpretation is not correct. Therefore, this Court finds that each question of the *Cardinal Towing* test constitutes a separate method of determining whether a state acted as a market participant.[3]

Johnson further argues that the District cannot establish that it was acting as market participant under either prong of the *Cardinal Towing* test. (Johnson's Reply p. 3.) With regard to the first prong, Johnson suggests that the District's signing of the PSA was not aimed at ensuring efficiency as required by *Brown*. (Johnson's Mot. p. 6.) This Court finds that whether the District's actions were aimed at efficiency or whether a private entity would enter a similar agreement are genuine issues of material fact better left to a resolution on a full factual record.

In addition, Johnson argues that the District's actions do not satisfy the second prong of *Cardinal*

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[3] Johnson argues that the language in *Cardinal Towing* suggests that the Fifth Circuit required both prongs to be satisfied in order for the action to constitute market participation. (Johnson's Reply p. 4.) Johnson quotes the following language from *Cardinal Towing* to support this claim: "[s]ince the answer to both questions here is affirmative, this case is at least on the surface firmly within the realm of *Boston Harbor*'s permissible proprietary action." *Cardinal Towing*, 180 F.3d at 693. The Court is not persuaded by Johnson's reading of this language.

Towing because the PSA was not tailored to a single project. (Johnson's Reply p. 6.) Johnson points out that the Supreme Court in Brown noted how its decision in *Boston Harbor* "stressed that the challenged action was specifically tailored to one particular job." *Id.*; *Brown*, 128 S. Ct. at 2425 (citing *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/ Rhode Island, Inc.*, 507 U.S. 218, 232 (1993) ("*Boston Harbor*")). Johnson argues that the *Brown* Court held that the state acts as a market participant only when a project labor agreement is specifically tailored to one project. (Johnson's Mot. p. 1.) This Court disagrees with Johnson's interpretation of *Brown*.

The Court in *Brown* merely noted that the fact that the challenged action in *Boston Harbor* was specifically tailored to one particular job was an important factor in deciding whether the state acted as a market participant in that case. The fact that the state in *Boston Harbor* was involved in only one project was evidence that the action was narrow in scope. It does not logically follow that, in every case, a state acts as a market participant *only* when the challenged action relates to a single project.

This Court finds that it is possible for a state to act as a market participant with regard to more than one project at a time. It is commonplace, for example, for a private entity to enter into a business agreement which covers more than one project at once with the purpose of addressing a specific proprietary problem in the most efficient way possible.[4] Therefore, the

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[4] For example, a home builder planning six projects might enter into a multi-year, multi-project contract for lumber and concrete in order to ensure price and availability, clearly

Court declines to reexamine its previous holding that the state action in this case satisfies the second prong of *Cardinal Towing*.

Finally, Johnson argues that the PSA cannot be considered market participation because the District's actions would be unlawful if it were a private entity. (Johnson's Mot. p. 7.) Indeed, the court in *Boston Harbor* found that "[i]n the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and *where analogous private conduct would be permitted*, this Court will not infer such a restriction." *Boston Harbor*, 507 U.S. at 231-232 (emphasis supplied).

Johnson argues that the PSA cannot qualify as "market participation" because the NLRB recently held in *Glens Falls Building and Construction Trades Council*, 350 NLRB No. 42, 182 LRRM 1499, 2007 WL 2220267 (2007) ("*Indeck*"), that it is unlawful under the NLRA for a private owner/developer to sign a project labor agreement comparable to the PSA with a union with which it has no collective bargaining relationship and the union does not represent any of the owner's employees.

Section 8(e) of the NLRA states that:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any

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legitimate proprietary concerns. Viewed in this light, labor is simply another input.

> of the products of any other employer, or to cease doing business with any other person . . . *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . .*

29 U.S.C.A. § 158(e) (emphasis supplied).

The parties disagree as to whether the construction industry proviso of Section 8(e) applies. (Johnson's Mot. p. 8; District's Reply p. 11-12.) Johnson argues that it does not apply because the PSA was not reached in the context of a collective bargaining relationship. (Johnson's Mot. p. 8.) The District concedes that the PSA was not reached in the context of a collective bargaining relationship. (District's Reply p. 11.)

In *Indeck*, however, the Board found that "secondary union-signatory clauses might be protected by the proviso *even without a collective bargaining relationship* if they were directed towards the reduction of friction that may be caused when union and nonunion employees of different employers are required to work together at the same jobsite." *Indeck*, 350 NLRB No. 42 at 7. The Board also noted that the agreement at issue in *Indeck* was not covered by the construction industry proviso because the agreements did not arise in the context of a collective-bargaining relationship and were not "executed for the purpose of preventing conflict between union and nonunion labor on a common construction situs." *Id.* at 1.

The District argues that the PSA is intended to minimize the workaday tensions by standardizing wages and working conditions, and incorporating no-strike clauses, procedures to resolve jurisdictional disputes, and commitments to work despite the expiration of local agreements. (District's Reply p. 12; Order p. 2.) This Court agrees. For example, the PSA states that stabilizing wages, hours, and working conditions for the workers will ensure a "satisfactory, continuous and harmonious relationship . . . among labor and management . . ." (PSA, p. 1.) The PSA also states that "Measure E Projects will be best served if said projects can proceed in an orderly manner without disruption because of strikes, sympathy strikes, work stoppages, picketing or other interferences with work . . ." (*Id.*)

At oral argument, Johnson pointed out that the state prevailing wage law sets uniform wage standards and thus already reduces friction among workers. *See* Cal. Labor. Code § 1773.1. Therefore, Johnson argued, the fact that the PSA standardizes wages does not act to reduce friction. This Court disagrees. As noted above, the PSA also attempts to reduce friction and stabilize working conditions by means other than stabilizing wages. For example, the PSA addresses grievance and safety procedures and prohibits strikes, sympathy strikes, work stoppages, picketing, and handbilling. (PSA, pp. 3, 4, 10.) While the Labor Code may ameliorate labor strife, it hardly supplants the need for the PSA.

The language of the PSA suggests that the PSA applies to both union and non-union workers and that both types of workers will work on the Measure E Projects. For example, the PSA states that "large numbers of workers of various skills will be required

in the performance of the construction work on the Measure E Projects, *including* workers affiliated with and/or represented by the Unions and/or the BCTC . . ." (*Id.*) (emphasis supplied). The PSA also states that "[t]he District, *the Union(s), all Contractors* and their employees shall comply with all applicable federal and state laws . . ." (*Id.* at 8) (emphasis supplied).

Moreover, the Supreme Court has suggested that the construction industry proviso is intended to cover more than just agreements addressing conflict between union and nonunion labor. In *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 633 (1975) (citing *N.L.R.B. v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675) (emphasis supplied), the Supreme Court described the proviso in broad terms and explained that it "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to *common-situs relationships on particular jobsites as well.*"

In *Woelke & Romero Framing, Inc. v. N.L.R.B.*, 456 U.S. 645, 661-662 (1982) (emphasis supplied), the Supreme Court discussed some of the *Denver Building Trades* problems that Congress intended to address by passing the construction industry proviso. The Supreme Court stated:

> It is clear, however, that those who wished to overrule *Denver Building Trades* were concerned about more than the possibility of jobsite friction. Critics of *Denver Building Trades* complained that contractors and subcontractors working together on a single construction project are not the sort of neutral parties that the secondary

boycott provisions were designed to protect. They pointed out that the *Denver Building Trades* rule denied construction workers the right to engage in economic picketing at their place of employment. And they emphasized that the employees of various subcontractors have a close community of interest, and that the wages and working conditions of one set of employees may affect others. In fact, as the Court of Appeals noted, the problem of jobsite friction between union and nonunion workers received relatively little emphasis. *See* 654 F.2d, at 1319.

The proviso helps mitigate the impact of the Denver Building Trades decision: although it does not overrule the ban on picketing, *it confirms that construction industry unions may enter into agreements that would prohibit the subcontracting of jobsite work to nonunion firms.* However, *petitioners' argument-that the proviso was intended primarily as a response to Denver Building Trades, and that it should therefore be interpreted as protecting only those clauses designed to prevent jobsite friction-rests on faulty premises.* As we have already shown, *see supra*, at 2077-2080 the proviso was not designed solely as a response to the *Denver Building Trades* problem. And even as a response to *Denver Building Trades, the proviso is only partly concerned with jobsite friction.*

As mentioned above, the PSA discusses stabilizing wages, hours, and working conditions for the workers. (PSA, p. 1.) This addresses the *Denver Building Trades* problem that "various subcontractors have a close community of interest, and that the wages and working conditions of one set of employees may affect

others." *Woelke & Romero Framing, Inc.*, 456 U.S. at 661-662. The Supreme Court expressly stated that this problem was one of the reasons Congress implemented the construction industry proviso. *Id.* Therefore, this Court finds that the proviso applies and that a private entity could have lawfully entered into the PSA.[5] Thus, the District is not precluded from acting as a market participant.

C. *Healthcare Ass'n of N.Y. State v. Pataki*

Johnson also contends that the PSA cannot be considered market participation because the District's actions extend beyond the state's funds. (Johnson's Mot. p. 11.) Johnson appears to argue that summary judgment should be denied because there is evidence that District's new media center was constructed under the PSA even though it was partially paid for with federal funds. (*Id.* at 12.) Johnson points to *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87 (2d Cir. 2006), to support its argument.

This Court finds, however, that *Healthcare* is distinguishable from the instant case. The issue in *Healthcare* was whether a New York statute, which restricted employers from spending funds received from the State to hire employees or contractors to attempt to influence union organizing campaigns, was preempted by the NLRA. *Id.* at 90-91. The court found that a state attempt to restrict spending of

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[5] The District also argues that Section 8(f) is relevant to this issue. District's Reply p. 7; 29 U.S.C.A. § 158(f). However, 8(f) states that "it shall not be an unfair labor practice under subsections (a) and (b) of this section . . ." 29 U.S.C.A. § 158(f). Section 8(f) is therefore applicable to 8(a) and (b) but not 8(e). Moreover, 8(f) is applicable to employers "engaged primarily in the building and construction industry . . ." *Id.* The District does not qualify as such an employer.

non-state funds was regulatory rather than proprietary action. *Id.* at 106, 109. In other words, the state could only legitimately argue that it was acting as a market participant in restricting the use of its own funds. The court also held that a state "cannot leverage its money to affect a state contractor's protected activity *beyond the contractor's dealings with the [s]tate.*" *Id.* at 102 (emphasis supplied).

Johnson argues that *Healthcare* stands for the proposition that a state does not have any proprietary protection when it uses federal money. (Johnson's Mot. p. 12.) This Court does not agree with this broad interpretation. The mere fact that the District may have used federal funds in the construction of a project covered under the PSA does not mean that the District acted as a regulator in entering the PSA. In *Healthcare*, the restriction of non-state funds was significant because the state was not acting in its own proprietary interest. In the instant case, the District was not attempting to restrict spending of non-state funds nor was it attempting to control or regulate activity beyond dealings with the state.

IV. CONCLUSION

This Court finds that the District acted as a market participant when it entered the PSA. Therefore, the District's motion for summary judgment is granted.

The Court directs the defendant to prepare, serve and lodge, forthwith, a proposed judgment consistent with this Court's rulings.

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Initials of Preparer kjt

APPENDIX D

Constitutional and Statutory Provisions At Issue

Supremacy Clause of the United States Constitution, Art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Section 8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(e)

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or

an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 8(f) of the NLRA, 29 U.S.C. § 158(f)

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organi-

zation an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Supreme Court, U S
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No. 10-889

IN THE

Supreme Court of the United States

WES BERTALAN, *et al.*,
Petitioners,

v

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT, *et al.*,
Respondents

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

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IN THE

Supreme Court of the United States

No. 10-889

WES BERTALAN, *et al.*,
Petitioners,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT, *et al.*,
Respondents

On Petition For A Writ of Certiorari To the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JURISDICTION

For the reasons cited in the margin, this Court lacks jurisdiction because this case is moot.[1]

[1] Although the Project Stabilization Agreement ("PSA") challenged herein expired before this case reached the Ninth Circuit, that court erroneously asserted jurisdiction on the grounds that the case fell within the "capable of repetition yet evading review" exception to mootness (Appendix A to the Petition for Writ of *Certiorari* ("Pet App A") at 7a) Thus "doctrine applies only in *exceptional* situations, where the following two circumstances [are] simultaneously present (1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again " *Spencer v Kemna*, 523 U S 1, 18 (1998) (internal quotation marks and citations omitted, emphasis added)

STATEMENT OF THE CASE

The Rancho Santiago Community College District received its voters' authorization to issue $ 337 million in bonds to fund improvements to its facilities, and with that authorization, it embarked on a construction program. Like the Massachusetts Water Resources Authority ("MWRA") in *Building and Construction Trades Council v. Associated Builders and Contractors of Mass./R.I.* ("*Boston Harbor*"), 507 U.S. 218 (1991), the District decided to conduct its construction under a Project Stabilization Agreement ("PSA"), a prehire collective bargaining agreement that sets the labor relations requirements for all contractors and subcontractors participating in the construction project. The District decided to use a PSA for precisely the same reasons as the MWRA: to ensure that its construction proceeded efficiently, without labor disruptions. (Pet App. A at 21a), *Boston Harbor*, 507 U.S. at 221. Moreover, the District's PSA, which placed conditions on its contractors only while they were working on the District's projects, was very sim-

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Building and Construction Trades Council v Associated Builders and Contractors of Mass /R I., 507 U S 218 (1991), established that federal law does not *per se* preempt a public entity's adoption of a PSA Indeed, Petitioners here argue that preemption turns on such issues as the agreement's purpose, scope and contractual technicalities The mere possibility that the District may enter into another PSA at some point in the future, (Pet App A at 10a-11a), therefore hardly creates a "reasonable expectation" that its relevant features will "subject [Petitioners] to the same action again," *Spencer v Kemna*, 523 U S at 17-18 Moreover, because the district court stayed proceedings in this case for significant periods while the case that became *Chamber of Commerce v Brown*, 554 U S 60 (2008), made its way through the Ninth Circuit and to this Court, (Pet App A at 10a), this case's peculiar procedural history, as much as the PSA's duration, accounts for the fact that the agreement expired before the case reached this stage of review Because this case therefore does not meet the criteria for the "capable of repetition yet evading review" exception to mootness, this Court does not have jurisdiction

ilar to the MWRA's project labor agreement ("PLA").[2] There were two surface exceptions: First, the District's PSA applied to construction projects funded with its bond initiative that cost over $ 200,000 and were initiated during a specified time period, (Pet. App. A at 4a), whereas, as characterized by this Court, the MWRA's PLA applied to "one particular job, the Boston Harbor cleanup project," 502 U.S. at 232. Second, the District itself executed its PSA, (Pet. App. A at 4a), while the MWRA enlisted its construction manager to negotiate and execute its agreement, 502 U.S. at 221.

The Ninth Circuit found these distinctions to be immaterial in evaluating the District's conduct. Instead, finding that the District "intended the PSA to serve legitimate proprietary goals, including containing costs, optimizing productivity and boosting the economy," (Pet. App. A at 23a), the Ninth Circuit held that the District's action in adopting the PSA served its interest in efficient procurement, (Pet. App. A at 27a).[3] The court also found the District had sufficiently tailored the PSA to serve its interests that – like the MWRA's conduct in *Boston Harbor* – its action qualified as market participation and, therefore, escaped the preemption analysis applicable to regulatory conduct under both the National Labor Relations Act ("NLRA") and the Employee Retirement Insurance Security Act ("ERISA"). (Pet App A at 27a-29a.)

Petitioners contend that the Ninth Circuit has "veered" from this Court's precedent in determining when a public

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[2] "Project stabilization agreement" and "project labor agreement" are two terms for the same sort of prehire collective bargaining agreement that is intended to stabilize labor relations across an entire construction project

[3] The court's findings in this regard belie Petitioners' assertion that the District failed to analyze whether the PSA would be economically beneficial, (Petition for Writ of *Certiorari* ("Pet.") at 8 n 2), an assertion that the Respondents dispute

entity acts as a market participant rather than a regulator for preemption purposes, (Pet. at 5), and that the Court should therefore take this case to provide necessary guidance to the lower courts. They further attack the Ninth Circuit's ruling for creating a circuit conflict by concluding that a public entity need satisfy only one prong of the "*Cardinal Towing* test" for its conduct to qualify as proprietary. (Pet. at 6, referring to *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir 1999).) As demonstrated below, however, there is nothing exceptionable about the Ninth Circuit's decision that would warrant this Court's review. It is, instead, fully consistent with this Court's jurisprudence and decisions of the other courts of appeals that have applied *Boston Harbor's* guidance in evaluating the significance of a state's participation in the marketplace, and simply does not provide the Court with a suitable vehicle for reviewing the issues the Petitioners seek to present.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit's Conclusion that the District Engaged in Proprietary Conduct Neither Conflicts with the Decisions of this Court and Other Circuit Courts of Appeals, Nor Presents any Issues Demanding this Court's Guidance.

The threshold question this case presented to the lower courts was whether in adopting the PSA, the District engaged in regulatory action, subject to preemption analysis under both the NLRA and ERISA,[4] or proprietary conduct, exempt from preemption.

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[4] While Petitioners assert that "[t]here is little question that [the] PSA is preempted if it is a regulation," (Pet. at 3), the Respondents dispute that assertion and, having decided that the District was engaged in proprietary conduct, the courts below never reached that question.

This Court originally distinguished between government acting as a regulator and government acting as a market participant in the labor context in *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. 282, 289-90 (1986). In *Gould*, this Court "rejected any facile distinction between regulation by mandate and regulation by conditioning public spending." *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F.3d 206, 213 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). *Gould* examined a Wisconsin statute that prohibited state procurement officers from purchasing any product manufactured or sold by an entity included on a list of labor law violators. *Gould*, 475 U.S. at 283-84. This Court held that although the State was acting in the marketplace, it "simply [was] not functioning as a private purchaser of services." *Id.* at 289. Instead, because its debarment statute was aimed at deterring NLRA violations, not at a procurement purpose, and because it "addressed employer conduct unrelated to the employer's performance of contractual obligations to the State" by debarring contractors who violated labor laws on public and private projects, inside and outside the state, "'for all practical purposes, Wisconsin's debarment scheme [was] tantamount to regulation,'" and therefore subject to preemption analysis. *Boston Harbor*, 507 U.S. at 228-229 (*quoting Gould*, 475 U.S. at 289).

The Court found the counterpoint to *Gould* in *Boston Harbor*. There, the MWRA, under a judicial order to complete its massive cleanup project within a set timeframe, decided to use a PLA to manage its project. 507 U.S. at 221. Finding that, in adopting the PLA, the MWRA was acting to protect a procurement interest by "attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost," and that its action was "specifically tailored" to serve that

interest, the Court concluded that its action was "not government regulation," and therefore was not subject to preemption principles. *Id.* at 232.

A. The Ninth Circuit Did Not Create a Circuit Conflict in Applying the *Cardinal Towing* Test.

In the wake of *Boston Harbor*, the lower courts have applied its teachings to "distinguish[] between proprietary action that is immune from preemption and impermissible attempts to regulate through the spending power." *Cardinal Towing*, *supra*, 180 F.3d at 693. The Fifth Circuit wrote in *Cardinal Towing* that

> the key under *Boston Harbor* is to focus on two questions: First, does the challenged action essentially reflect the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances? Second, does the narrow scope of the challenged action defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem? Both questions seek to isolate a class of government interactions with the market that are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out.

Id.

The Ninth Circuit adopted and applied *Cardinal Towing's* two questions in deciding this case. (Pet. App. A at 17a–19a) Petitioners claim that in writing that "a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption," (Pet App. A at 18a), the Ninth Circuit created a conflict with three other circuits that have "requir[ed] satisfaction of both tests," and with this

Court's precedents, (Pet. at 6, referring to *Cardinal Towing, supra, Healthcare Ass'n v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006); *Sage Hospitality, supra*, 390 F.3d at 215-16; and *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008)).

Petitioners' claim that the Ninth Circuit's decision has created a circuit conflict demanding this Court's resolution fails on a number of counts. First, neither the Second nor Third Circuits can fairly be said to have adopted or applied the *Cardinal Towing* test. Rather, in *Pataki*, the Second Circuit quoted the test, but found it unnecessary to engage in "[t]he market-participant analysis" to decide the issues before it. 471 F.3d at 109. And in *Sage Hospitality*, the Third Circuit referred to *Cardinal Towing* without any discussion, then framed its own "two step test" for determining "whether a government's condition of funding constitutes market participation . . . within *Boston Harbor's* exception to preemption review." 390 F.3d at 215-16.[5]

Second, *Cardinal Towing* does not itself directly address whether its "two questions" are to be read in the conjunctive or disjunctive. In fact, its observation that "[b]oth questions" focus on the same set of considerations suggests that satisfying either would be sufficient. As that court explained: "Both questions seek to isolate a class of government interactions with the market that

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[5] The Third Circuit asks, first, whether "the challenged funding condition served to advance or preserve the state's proprietary interest in a project or transaction as an investor, owner, or financier," and second, whether "the scope of the funding condition [is] 'specifically tailored' to the proprietary interest." *Id.* at 215-16, *quoting Boston Harbor*, 507 U.S. at 232. Unlike *Cardinal Towing*, and contrary to the position of the Petitioners, the Third Circuit's criteria do not turn on any "comparison with the typical market behavior of private parties in similar circumstances." (Pet. at 10.)

are so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out." 180 F.3d at 693.

More to the point for current purposes, however, the fact is that notwithstanding the Ninth Circuit's "hold[ing] that a state action need only satisfy one of the two *Cardinal Towing* prongs to qualify as market participation not subject to preemption," (Pet. App. A at 18a), the Ninth Circuit actually found "that the PSA challenged here satisfies *both* prongs of the *Cardinal Towing* test and accordingly is not subject to preemption by the NLRA and ERISA," (Pet. App. A at 19a (emphasis added).)[6] As a result, a decision by this Court endorsing the *Cardinal Towing* test and holding that state action must satisfy both of its prongs to escape preemption analysis would have no impact on the outcome of this case.

B. The Ninth Circuit Did Not Create a Circuit Conflict in Finding that the District was Pursuing Proprietary Goals.

Petitioners' further contention that the Ninth Circuit created a circuit conflict by holding that proprietary conduct could be grounded in any procurement that "serves the state's purposes," (Pet. at 8), similarly falls short. In considering whether the PSA reflected the District's interest in "efficient procurement," the Ninth Circuit did refer

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[6] Indeed, the Ninth Circuit's decision also neatly fits the test the Third Circuit articulated in *Sage Hospitality*, 390 F.3d at 215-16, since it found that the PSA served the District's interest in completing its construction projects without labor disruptions and otherwise "containing costs, optimizing productivity, and boosting the economy," (Pet. App. A at 21a, 23a), and that it was tailored to that interest, both by being limited to specified projects financed by its bond initiative, (Pet. App. A at 27a), and, unlike *Gould*, by "addressing only how construction contractors and subcontractors will perform work on the District's projects," (Pet. App. A at 23a).

to its earlier decision in *Engine Manufacturers Association v. South Coast Air Quality Maintenance District*, 498 F.3d 1031, 1040 (9th Cir. 2007), for the proposition that "even though the state entity pursued environmental, as opposed to economic, goals through its participation in the market, the market participant doctrine still applied." (Pet. App. A at 22a.) *Engine Manufacturers*, however, is not before this Court; and the Ninth Circuit did not rest its holding in the instant case on this broad proposition. Rather, the court acknowledged that "*Gould* . . . necessarily places limits on what can qualify as an interest in 'efficient procurement,'" *id.*, and while the court did not fully define where those limits lie, it found that the District's interests in adopting the PSA were unquestionably "legitimate proprietary goals, including containing costs, optimizing productivity, and boosting the economy." (Pet. App. A. at 23a.)[7] These are precisely the same kinds of goals this Court recognized as proprietary in *Boston Harbor*. *See* 507 U.S. at 232.

In short, if this Court were to grant *certiorari* to determine whether a public entity's conduct in pursuing broadly-defined social goals in the marketplace could qualify as non-regulatory conduct, its decision would have no bearing on the outcome of this case.

C. The Ninth Circuit's Conclusion that the PSA was Tailored to the District's Proprietary Goals is Consistent with this Court's Jurisprudence.

In distinguishing the regulatory conduct in *Gould* from the proprietary conduct in *Boston Harbor*, this Court noted that Wisconsin's debarment statute addressed

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[7] In making this finding, the court rejected Petitioners' contention – which they reprise here, (Pet. at 8 n.2), and which the Respondents continue to dispute – "that the PSA's primary purpose was to reward the unions that supported the Measure E campaign," (Pet. App. A at 23a).

"employer conduct unrelated to the employer's performance of its obligations to the State," while the MWRA's conduct was tailored to its proprietary interest in "one particular job, the Boston Harbor cleanup project." *Boston Harbor*, 507 U.S. at 228-29, 232. Petitioners latch onto *Boston Harbor's* reference to the cleanup project as "one particular job" to argue that the Ninth Circuit "gutted" this Court's jurisprudence by finding proprietary conduct in a spending condition attached to a series of related construction projects. (Pet. at 11.) In so doing, Petitioners ignore this Court's point in focusing on the scope of the MWRA's spending condition: *i.e.*, to determine whether it was sufficiently tailored to the public entity's proprietary interest to "defeat an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing*, 180 F.3d at 693; *see also Sage Hospitality*, 390 F.3d at 216 ("the scope of the funding condition [must be] 'specifically tailored' to the proprietary interest,"*citing Boston Harbor*, 507 U.S at 232).

The Ninth Circuit identified the District's proprietary interest, *inter alia*, as conducting the facilities improvement program financed through Measure E bonds in a manner that "contain[ed] costs, optimiz[ed] productivity and boost[ed] the economy." (Pet. App. A at 23a.) And it found that the District tailored the PSA to that interest by "limit[ing] its reach to construction projects costing over $200,000 that were paid for with the $ 337 million of Measure E funds and that were initiated during the three-year term of the agreement." (Pet. App. A at 27a.) This finding is completely consistent with the principles enunciated by this Court in *Boston Harbor* and reiterated in *Brown*. Whatever more difficult issues may have been presented in the cases Petitioners cite (matters such as broadly-applied labor peace agreements and blanket, across-the-board bans on PLAs, (Pet. at 13 and n.6)), they

are simply not presented by the facts of this case Such issues therefore would not be resolved by a grant of *certiorari* in this case[8]

In short, Petitioners' first question does not warrant this Court's review.

II. The Ninth Circuit's Holding that a State's Conduct Need Not Satisfy the Technical Requirements of the NLRA to Escape Preemption Does Not Require this Court's Review

In *Boston Harbor*, the MWRA decided that using a PLA would serve its proprietary interests, and it directed its construction manager to negotiate and execute an agreement that was binding on all contractors and subcontractors working on the project. 507 U.S at 221-22. Here, once the District decided that using the PSA would satisfy its proprietary interests, it directly negotiated and executed the PSA, which it similarly made a condition of working on the project. (Pet. App. A at 26a.)

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[8] Petitioners' further contention that the Ninth Circuit erroneously held that it was "irrelevant that 'no private party would have entered into a project labor agreement providing so few benefits,'" (Pet at 10, *quoting* Pet App A at 24a), suggests that the court actually concluded that the PSA was a bad deal for the District The court made no such finding, but instead, in the cited passage, was referring to the Petitioners' position, which the Respondents vigorously dispute Indeed, as discussed, the court found that the District intended the agreement to bring it substantial benefits, by containing costs, optimizing productivity, boosting the economy, avoiding labor unrest, and maximizing work opportunities for the District's residents and women and minority-owned businesses (Pet App A at 21a, 23a, 28a) While we submit that the court was correct as a legal matter in observing that "whether the PSA was a good deal for the District does not bear on whether the Agreement is proprietary or regulatory," (Pet App A at 24a), its findings as to the value the District expected the agreement to bring reduces this observation to mere *dicta*, and therefore no basis upon which to grant *certiorari*

Congress authorized PLAs in the private sector through two exceptions to the NLRA's general rules: Section 8(f), 29 U.S.C. §158 (f), permitting unions and employers "primarily in the construction industry" to enter into collective bargaining agreements before the employer hires a complement of employees and begins work; and the construction industry proviso to §8(e), *id* §158(e), permitting unions and employers "in the construction industry" to agree to limit the businesses to which the employers will subcontract work. Neither the NLRA's general rules, nor the §§8(e) and (f) exceptions to those rules, apply by their terms to public entities like the District. *Id.* § 152(2) ("The term "employer" . . shall not include . . . any State or political subdivision thereof . . ."). Petitioners nonetheless contend that preemption is triggered unless the public entity's conduct is *identical* to that permitted by the NLRA, and that because, in their view, a private entity standing in the District's shoes could not lawfully execute a PSA, the District's conduct in this case is preempted. (Pet. at 17-18.)

The Ninth Circuit rejected this contention, holding — correctly — that whatever NLRA implications the difference in the MWRA's and District's contracting approaches might have in the private sector have no bearing on whether their conduct is proprietary for preemption purposes. Rather, what is relevant is that the MWRA and the District were both responding to "conditions specific to the construction industry" by utilizing precisely the kind of prehire agreements Congress authorized to accommodate those conditions. (Pet. App. A at 26a, *quoting Boston Harbor*, 507 U.S. at 231.)[9] Indeed, as the Ninth Circuit further noted,

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[9] After acknowledging that the exceptions §§ 8(e) and (f) provide for the construction industry, "like the prohibitions from which they provide relief, are not made specifically applicable to the State," the Court in *Boston Harbor* explained

making preemption turn on whether the public entity was in technical compliance with the terms of the NLRA would "conflict with the clear congressional intent to exempt state employers from the NLRA's reach." (Pet. App. A at 25a.)[10]

Contrary to Petitioners' contentions, the Ninth Circuit's refusal to hold that "the NLRA preempt[s] a public purchaser of construction services from enforcing union agreements illegal for private purchasers to enforce," (Pet. at 16), simply does not demand this Court's attention. First, Petitioners' underlying premise — that "[i]f the District were a private entity, it would violate the NLRA by entering into the PSA," (Pet. at 18) – is far from a settled matter. It is instead a matter that the Respondents dispute and that raises issues that were not resolved below. (Pet. App. A at 24a n.7.)

> Nevertheless, the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections
>
> It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry
>
> * * * * *
>
> *There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services*

507 U S at 230-31 (emphasis added)

[10] In fact, Petitioners' argument in this regard — a variation on their broader contention that "state actions that conflict with the federal law are preempted and unconstitutional," (Pet at 7) — ultimately conflicts with their own interests, since we doubt they would agree that it would be "preempted and unconstitutional" for a state entity, acting as an employer, to bar its employees from engaging in collective bargaining or other concerted activity that the NLRA guarantees to private employees

Second, as far as Respondents have been able to determine, the question whether preemption turns on technical compliance with the NLRA is a question of first impression that no other circuit court of appeals has decided. There is therefore no conflict in the circuits on this issue for the Court to resolve.

Finally, a decision on this issue would have little practical impact on what the Petitioners posit as the real evil lurking in this case: the unions' supposed aggressive campaign of "impos[ing] themselves on all contractors and their employees on [a] project[] in one stroke" "[b]y targeting the [public] entity at the apex of any construction project." (Pet. at 20-21.) According to Petitioners, unless this Court holds public entities to the same contracting strictures that it believes Congress imposed on private entities, unions will "become free to enlist any public entity over which they have political influence to exert pressure on private contractors and their employees to unionize." (Pet. at 21.)[11]

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[11] Respondents vigorously contest Petitioners' assertions that public sector PLAs, and the interests of labor unions in encouraging public entities like the District to enter into such agreements, are inconsistent with Congress' intent. Indeed, as this Court has observed, when a public entity, "acting in the role of a purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it [exemplifies] the workings of the market forces that Congress expected to find." *Boston Harbor*, 507 U.S. at 233. Respondents also dispute Petitioners' contention that using PLAs "increase[s] public construction costs by excluding contractors and employees who wish to work nonunion." (Pet. at 21.) In any event, this Court has already concluded that when a public owner decides to "choose[] a contractor based upon that contractor's willingness to enter into a prehire agreement," the fact that "those contractors who do not normally enter such agreements [may decide] to seek business from purchasers whose perceived needs do not include a" PLA does not make the public entity's decision any less that of a market participant. *Boston Harbor*, 507 U.S. at 231.

Putting aside the overblown rhetoric, the fact is that even if this Court were to hold that the NLRA precludes private and public owners alike from directly entering into PLAs, the effect of that decision would simply be to require entities like the District to do precisely what the MWRA did: retain a "middleman" to negotiate and execute the agreement. (Pet App A at 27a.) Respondents submit that adding this additional step (and cost) to the contracting process would likely do little to dissuade a public entity from using a PSA if, acting in its proprietary capacity, it decides that using one will serve its proprietary interests.

In short, rather than being a question of "exceptional importance" that begs this Court's attention, this is a question the resolution of which will do little to address the Petitioners' purported concerns. For all of these reasons, Petitioners' Second Question does not warrant the Court's review.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the Court should deny the petition for writ of *certiorari*. The Ninth Circuit correctly decided this case. Furthermore, the facts and issues this case presents do not provide an appropriate vehicle for the analysis Petitioners urge this Court to undertake.

Respectfully submitted

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IN THE

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Petitioners,

v.

RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. The New Legal Standard Adopted by the Ninth Circuit for the Market Participant Exemption Requires This Court's Review

1. Respondents' opposition brief is remarkable in that it makes almost no effort to defend the expansive new test adopted by the Ninth Circuit for whether a state is acting as a market participant exempt from the preemptive effects of federal law. Instead, the crux of Respondents' argument is that their conduct would be lawful even if the Ninth Circuit had adopted a narrower test. But this does not change the fact that the Ninth Circuit *did* adopt a new legal standard that dramatically expands the breadth of the market participant exemption. This

case is a suitable vehicle for reviewing the propriety of that standard, because the result in this case will be different if this Court adopts a narrower, more appropriate test for market participation.

It is uncontested that the Ninth Circuit in this case held, as a matter of law, that: (1) the market participant exemption requires only that a state action be for "efficient procurement" or "narrow in scope," and not both (App. 18a); (2) "efficient procurement" encompasses non-pecuniary, policy objectives (App. 21a-22a); (3) "narrow in scope" encompasses rules of general application, and does not require that the state action be tailored to a particular project (App. 27a-28a); and (4) analogous private conduct need not be lawful for a state to act as a market participant (App. 24a-25a). This legal standard is now binding law throughout the expanse of the Ninth Circuit.

It is this new legal standard for market participation that conflicts with the legal standards delineated by this Court and several circuit courts of appeal. (Pet. 6-12).[1] And it is this expansive legal standard

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[1] Respondents' claim that the Second, Third, and Fifth Circuits did not adopt conjunctive two-part tests for market participation that differ from the disjunctive test adopted by the Ninth Circuit here. (Opp. Br. 7). This claim cannot survive a review of those decisions. Compare *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999) (city acted as market participation when both prongs of test were satisfied); *Hotel Employees Union v. Sage Hospitality*, 390 F.3d 206, 215-17 (3d Cir. 2004) (same); *Healthcare Ass'n v. Pataki*, 471 F.3d 87, 109 (2d Cir. 2006) (state did not act as market participant when one prong of test was not satisfied, implying that satisfaction of both prongs is required). Respondents simply ignore this Court's recitation of a conjunctive standard for market participation in *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008).

that threatens to undermine the supremacy of federal law. (Pet. 13-16). Thus, it is with respect to this legal standard that the Court's guidance is needed, both to resolve this conflict of authority and to establish a proper test for market participation.

2. Adopting a narrower and proper test for market participation will also change the outcome of this case. If "efficient procurement" is held to require a state interest in efficient procurement—instead of encompassing any policy objective that "serves the state's purposes," as the Ninth Circuit has held (App. 21a)—the District could not satisfy this requirement on remand, as there is undisputed evidence that District officials did not undertake any analysis to determine if the PSA would be economically beneficial. If market participation is properly held to require that a state action "'be specifically tailored to one particular job,'" *Chamber of Commerce v. Brown*, 554 U.S. 60, 70 (2008) (citation omitted), the District's PSA—which is a rule of general application that governs all District construction projects financed by Ballot Measure E that cost more than $200,000—cannot survive scrutiny. If it is held relevant whether "analogous private conduct would be permitted," *Building & Constr. Trades Council v. Associated Builders & Contractors ("Boston Harbor")*, 507 U.S. 218, 231 (1993), the District could not be considered a market participant because private purchasers of construction services cannot enter into agreements like the PSA under §§ 8(e) and (f) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(e) and (f). (*See* Pet. 17-20). Accordingly, this case is an appropriate vehicle for reviewing the propriety of the Ninth Circuit's expansive new test for the market participant exemption.

II. The Ninth Circuit's Decision That the NLRA Does Not Preempt Public Entities from Enforcing Union Subcontracting and Pre-Hire Agreements That Would Be Unlawful Under the NLRA Undermines the Integrity of Federal Labor Policy, and Should Be Reviewed by This Court

1. In *Boston Harbor*, this Court held that "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a [union] prehire agreement, a public entity as purchaser should be permitted to do the same." 507 U.S. at 231.[2] Other than nakedly asserting that the law is unsettled, Respondents make no attempt to refute that private purchasers could not lawfully enter into the PSA under §§ 8(e) and (f) of the NLRA. (Pet. 17-18). Nor do Respondents attempt to distinguish this Court's holding that union subcontracting agreements entered into outside of a representational relationship, as the PSA is here, are repugnant to congressional intent to limit top-down organizing pressures under the NLRA. *See Connell Constr. Co. v. Plumbers & Steamfitters, Local 100*, 421 U.S. 616, 631-33 (1975); (Pet. 19-21).

Respondents inconsistently assert that it does not matter if the District's conduct is in "technical compliance" with the NLRA, so long as it is "utilizing

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[2] Respondents' argument that the NLRA does not apply to political entities was directly addressed by this Court in *Boston Harbor*—while "the State is excluded from the definition of 'employer' under the NLRA . . . the general goals behind passage of §§ 8(e) and (f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections." 507 U.S. at 231. Confoundedly, Respondents themselves quote this passage in their brief, and then proceed to ignore it. (Opp. Br. 12-13, fn. 9).

precisely the kind of pre-hire agreements Congress authorized to accommodate [conditions in the construction industry]." (Opp. Br. 12-13). This is nonsensical. How can an agreement unlawful under §§ 8(e) and (f) of the NLRA be "precisely the kind of prehire agreements Congress authorized?" (*Id.*). What Congress authorized is stated in the NLRA's language. *Cf. Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes"). Moreover, *Connell* makes clear that union subcontracting agreements with strangers, such as the PSA here, are not agreements that Congress intended to be lawful under the NLRA. 421 U.S. at 631-33; (*see* Pet. 19-20). The PSA is offensive both to the text and spirit of the NLRA, and thus is not the type of state interference with labor relations that Congress intended to escape federal preemption under that Act.

2. Respondents attempt to minimize the importance of this issue by claiming that, if this Court holds that the NLRA preempts public purchasers from entering into union pre-hire agreements, public purchasers will circumvent this restriction by "retain[ing] a 'middleman' to negotiate and execute the agreement." (Opp. Br. 15). To the contrary, it is unlikely that public purchasers will seek a union pre-hire agreement except pursuant to an agreement with the union.[3] This is true not only because public pre-hire

[3] A subcontracting agreement between a public purchaser and union in which the purchaser agreed to only do business with a general contractor (i.e., "middleman") that negotiates and executes a union agreement would itself be preempted by the NLRA, as this type of subcontracting agreement is unlawful under § 8(e) of the NLRA.

agreements are generally the result of union influence on the public entity (*see* Pet. 22 n.16), but also because rational public entities will not blindly command a "middleman" to enter into a binding agreement that governs their construction projects without first negotiating the substantive terms of that agreement with the union.

In any case, the possibility that unilateral actions by public entities may escape preemption does not diminish the importance of the issue presented. Again, the pressing problem is that *unions* are circumventing the NLRA's prohibitions on secondary economic pressure by accomplishing through public entities what Congress barred them from accomplishing through private entities. (Pet. 20-22). Here, the Union is using the District to do precisely what *Connell* held to be unlawful under the NLRA when done through a private entity—applying top-down organizing pressure on contractors and their employees via a "stranger" with which the union lacks a representational relationship. 421 U.S. at 631-32.

Accordingly, accepting review in this case and holding that the NLRA preempts public entities from entering into union agreements unlawful under the Act will serve to protect the integrity of federal labor policy. This is the purpose of preemption under the NLRA. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959).

III. The Court Should Accept Review Because This Case Is Not Moot

Respondents argue in a footnote that this case is moot because the PSA has expired. The lower court properly rejected this argument (App. 7a-13a), as Respondents have not met their "heavy burden" of establishing mootness. *County of Los Angeles v.*

Davis, 440 U.S. 625, 631 (1979) (citation omitted). First, Respondents have failed to establish that Petitioners will not be subjected to a policy akin to the PSA in the future. Second, the three-year duration of the PSA was necessarily too short to allow for full litigation before it expired. Thus, this case falls within the exception to the mootness doctrine because it is capable of repetition and yet evading review. *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007). "To abandon the case at an advanced stage may prove more wasteful than frugal." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 191-92 (2000).

CONCLUSION

The Ninth Circuit's adoption of a new legal standard for the market participant exemption warrants review by this Court. The standard not only is inconsistent with the precedents of this Court and others, but its sheer breadth threatens to swallow the general rule of federal preemption delineated in the Supremacy Clause to the United States Constitution. The petition for certiorari should be granted.

Respectfully submitted,

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